Supreme Court of the United States

OCTOBER TERM, 1965

No. 760

MICHAEL VIGNERA, PETITIONER

vs.

NEW YORK

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

[fol. A]

IN THE COUNTY COURT, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK, PLAINTIFFS

against

MICHAEL VIGNERA, DEFENDANT

INDICTMENT—filed December 15, 1960

FIRST COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of ROBBERY IN THE FIRST DEGREE, committed as follows:

The defendant on or about October 11, 1960, in the County of Kings, unlawfully took from the person, possession and in the presence of HARRY ADELMAN a quantity of checks and United States currency, of the aggregate value of more than five hundred dollars, owned by HARRY ADELMAN, against his will, by means of force and violence, and fear of immediate injury to his person, the defendant at the time being armed with a dangerous weapon, to wit: a dangerous knife.

[fol. B] SECOND COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of GRAND LARCENY IN THE FIRST DEGREE committed as follows:

The defendant on or about October 11, 1960, in the County of Kings, stole and took from the person, possession and in the presence of HARRY ADELMAN in the night time a quantity of checks and United States currency of the aggregate value of more than five hundred dollars, owned by HARRY ADELMAN, with the intent to deprive the owner thereof, and of the use and benefit thereof, and to appropriate the same to the use of the defendant.

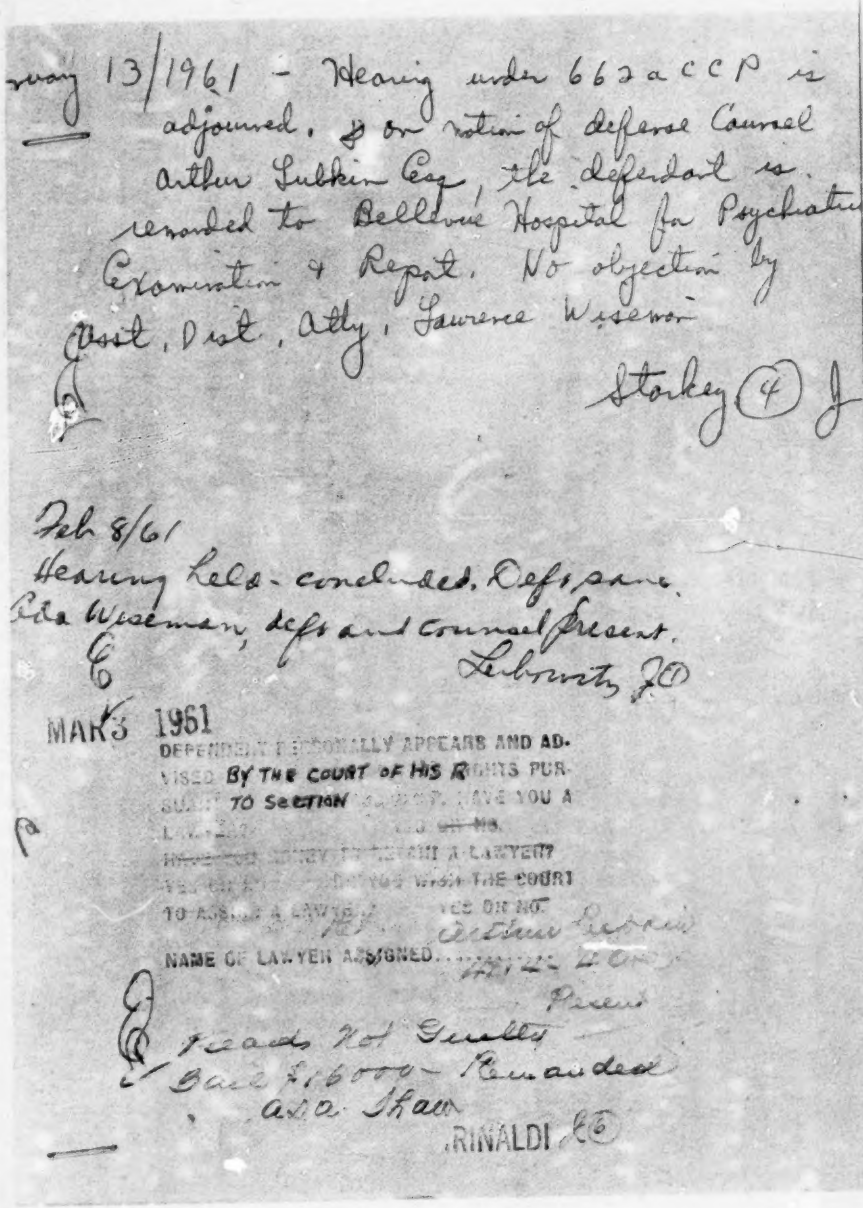
THIRD COUNT

The Grand Jury of the County of Kings, by this indictment, accuse the defendant of the crime of ASSAULT IN THE SECOND DEGREE, committed as follows:

The defendant on or about October 11, 1960, in the County of Kings, with intent to commit the crimes of robbery and grand larceny, wilfully and wrongfully assaulted HARRY ADELMAN.

/s/ Edward S. Silver
District Attorney

[fol. C]



May 13/1961 - Hearing under 662a CCP is adjourned. & on motion of defense Counsel Arthur Lubkin Esq, the defendant is remanded to Bellevue Hospital for Psychiatric Examination & Report. No objection by Asst. Dist. Atty. Laurence Wiseman

Storkey (4) J

Feb 8/61
Hearing held - concluded. Defs present.
Ida Wiseman, defs and counsel present.

Leibowitz J.C.

MAR 3 1961

DEFENDANT PERSONALLY APPEARS AND ADVISED BY THE COURT OF HIS RIGHTS PURSUANT TO SECTION ... HAVE YOU A LAWYER? ... DO YOU WISH THE COURT TO ASSIGN A LAWYER? YES OR NO.

NAME OF LAWYER ASSIGNED Arthur Leibowitz

Present

Pleads Not Guilty
Bail $1,000 - Remanded
A.D.A. Shaw

RINALDI J.C.

5-23-61 - On motion of defense counsel Arthur Fulton, Bellevue Hospital psychiatric report ordered - Leibowitz J.C.P.

TRIED
Part I 8/28/61-8/29-8/30/61
Judge Leibowitz
and a Jury
VERDICT - Guilty of Robbery 1st Degree.
Defs remanded
8/30/61 2 P.M. Leibowitz J.

Nov 3/61 3rd fel D. Defs filed. D/T
Arraigned advised, admits adjudged 3rd fel off.
Waives 2 days Sec sentence
Leibowitz J.C.

Note: This defendant having been in the Appellate Division
Rec'd appeal and notice filed on 2/6/63, This endorsement is made
on 2/7/63 per J 2/6/63.

2/6/63. The defendant was sentenced on 11/3/61 as a 3rd felony offender
to serve not less than Thirty (30) nor more than Sixty (60) years.
Counsel Arthur Fulton having moved to vacate said sentence
Sentence Set Thereby Vacated and Defendant Re-sentenced as a 2nd felony offender.
Defendant Arraigned upon the Information as a
2nd offender. Admitted said second felony offender.
Defendant sentenced to Thirty (30) to Sixty (60)
years. Remanded. Leibowitz, J.C.C.P.

[fol. D]

FEB 3 1961 Arraignment adjourned to 2/16/61

(TRIAL)

HON. [illegible]

FEB 16 1961

Trial Part ... in Bellevue Hosp Jail

Judge ... DEFENDANT FAILED TO APPEAR

ARRAIGNMENT ADJOURNED TO Mar 3/61

A. D. A ... SAMUEL S. LEIBOWITZ 26

Verdict ... See minute

(PLEA)

Part ...

Judge ...

A. D. A ...

Pleads Guilty to ...

Defendant personally appears and advised by the Court of his rights pursuant to Section 308, C.C.P. Have you a lawyer? Yes ~~or no~~. Have you money to retain a lawyer? Yes or no. Do you wish the Court to assign a lawyer? Yes or no.

Name of Lawyer assigned ... Arthur Lubkin 414-4 Ave. Nbrh

Withdrawn ASSIGNED FOR ARRAIGNMENT ONLY

(Committed)

NO. 4014/1960 16 40

THE PEOPLE

vs.

J. MICHAEL VIGNERA

INDICTMENT

ROBBERY—FIRST DEGRE

GRAND LARCENY - FIRST DEGR

ASSAULT - SECOND DEGR

A TRUE BILL

EDWARD S. SILVER
District Attorney

Pleads Not Guilty ... DEC 7 1960

Bail $16000 Rem

Judge ... HON. HYMAN BARSH

A. D. A ... Cohen

Filed ... DEC 15 1960

DEC 1 1960 - Arraignment bail vacated. Dft. com to To I.C.H. for mental observation

True Name Michael Vigorera

Male Female Color W

Age 31 Nativity B Cty

Residence 470 4 St
B'klyn

Occupation Laborer

Mechanical Trade None

Married Yes No

Read and Write Yes No

Degree of Education H S grad

Religion Cath

Degree of Religious Instruction Irreg

Parents Living Father

Temperate Intemperate

Drugs Yes No

Previous Conviction F. M.

Sentence Sing Sing Hurtly (30)
to Sixty (60) yrs

Judge Leibowitz

Date Nov 3 1967

atty Arthur Lubow present

3rd fel 1/11 - see inside

True Name

Male Female Color

Age Nativity

Residence

Occupation

Mechanical Trade

Married Yes No

Read and Write Yes No

Degree of Education

Religion

Degree of Religious Instruction

Parents Living

Temperate Intemperate

Drugs Yes No

Previous Conviction F. M.

Sentence

Judge

Date

[fol. 1]

IN THE COUNTY COURT
KINGS COUNTY

TRIAL TERM

PART I

THE PEOPLE OF THE STATE OF NEW YORK

against

MICHAEL VIGNERA, DEFENDANT

Indictment No. 4014/60: Rob. 1; Gr.Lar. 1; Aslt. 2

Brooklyn, New York

TRANSCRIPT OF PROCEEDINGS—August 28, 1961 et seq.

BEFORE:

HON. SAMUEL S. LEIBOWITZ,
County Judge

APPEARANCES:

J. MITCHELL ROSENBERG, ESQ.,
Assistant District Attorney
For the People

A. LUBKIN, ESQ.,
Attorney for the defendant

Martin Barris, CSR (els)
Official Stenographer

[fols. 2-4] * * *

[fol. 5] HARRY ADELMAN, called as a witness by the People, having been first duly sworn by the Clerk of the Court, and stating his address as 1347 48th Street, Brooklyn, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Mr. Adelman, how old are you, sir? A 61.

Q Are you the owner of a dress shop known as the Chapeaux de Mode located at 4822 13th Avenue in the Borough of Brooklyn, County of Kings? A Yes, sir.

Q How long have you been the owner of that shop? A 35 years.

Q Now, on October 11, 1960, that was a Tuesday, is that correct, sir? A That's right.

Q Now, on October 11, 1960, sometime in the afternoon, you were in the shop, is that correct? A Yes.

Q And did someone come into the shop? A Yes.

Q About what time was that? A 5:30, quarter to six, approximately.

Q In the afternoon? A In the afternoon.

Q Was it daylight? A Yes.

Q Tell us, please, what happened. A A man walked up to me and said it is a stickup. He put something [fol. 6] behind me and said it is a stickup, so I turned around by saying, "Are you kidding?" He said, "Walk to the back and don't make any wrong moves." We walked to the back.

Q Was something still behind you? A Naturally.

Q What was behind you? A To me it looked like a knife when I first glanced at it.

We walked to the back. My wife was in the back and another girl, a saleslady, she was doing some ironing in the back. So I happened to turn to a spot away from her like I was in a corner, like, so he put the knife—and I walked away, so he put the knife to her this way and holding it around this way, around the neck.

Q I am going to show you a picture and ask you is that an exact representation of the inside of your store

on October 11, 1960 (handing to witness). A That's my store.

MR. ROSENBERG: I offer that as People's Exhibit 1 in evidence.

THE COURT: Is there any objection?

MR. LUBKIN: No, your Honor.

(Marked People's Exhibit 1 in evidence.)

BY MR. ROSENBERG:

Q Do you walk through a doorway from the front portion of your store to the rear part of the store? A [fol. 7] This is the front part, then there is a back part.

Q I am going to show you these two photographs and I am going to ask you whether the two photographs together are an exact representation of the rear part of your store on October 11, 1960 (handing to witness). A That's it. This is the front of the back and this is the side of the back.

MR. ROSENBERG: I offer the two in evidence.

THE COURT: Any objection?

MR. LUBKIN: No objection.

THE COURT: Mark them in evidence.

(Marked People's Exhibits 2 and 3 in evidence.)

MR. ROSENBERG: May I pass the three, your Honor, to the jury?

THE COURT: Yes.

BY MR. ROSENBERG:

Q Mr. Adelman, you say the defendant had you go to the rear room at knife point; is that right? A That's right.

THE COURT: He didn't say it was the defendant.

Q The man who was in the store, it that right? A That's right.

Q Now, in the rear room you started to tell us that you went to a corner, is that right? A That's correct. [fol. 8] Q Now, can you show us where the corner is that you went to? A Yes, I could. This is the front

part on this side and where the machine is is the corner there. (Indicating.)

Q Where the ironing board is on Exhibit 2, is that right? A Yes.

Q Now, you went beyond where your sales girl was pressing? A Right.

Q Where was your wife? A She was sitting at the machine.

Q You went beyond her too? A Right there, actually near here, close to her.

Q Was this girl who was pressing, was she first? A She was the first one as you approached the room.

Q And your wife? A She was on the side.

Q You went beyond the girl that was pressing? A Right.

Q What happened then? A The man who came in, as soon as he saw the girl pressing, the first one we approached, he let me alone and put the knife and held it around first and then he made me come over to him.

Q What did he do with the girl, what did he do? A He just held her so that she can't run out.

Q What did he do with the knife? A He held it [fol. 9] against her side.

THE COURT: How did he hold it?

THE WITNESS: He put his arm around her neck.

Q You are indicating that his right arm is around the neck of this girl? A And the knife in the left hand against her side.

Q While he has the right hand around her neck? A He called me two or three times.

THE COURT: What did he say?

THE WITNESS: He said to me, "Come over here. You I want."

BY MR. ROSENBERG:

Q What was your position with respect to him then? A He was, let's say, over here, and I was over there.

Q Were you face to face with him? A Yes.

Q You saw him face to face? A Sure.

Q He said "Come over here"? A That's right.

Q You were farther away from that door, isn't that right, from that door leading to that rear room—you are farther away than he is? A That's right.

Q So did you walk over to him? A I had to. He made me walk over by saying, "If you don't come over, I will give it to you," so I came over and gave him what I said.

Q What happened when you came over to him? A [fol. 10] He made me give him—

Q What did he say? A He said "Give me what you got in your pockets."

Q What did you do? A I had to give it to him.

Q What did you do? A I give it to him. I took it out of my pocket and gave it to him.

Q You are referring to your pants pocket now? That's correct.

Q You had money in there? A In cash, $175.

Q In what form? A American money bill form.

Q Yes? A I had a little booklet with American Express checks, you know, a little book like they give you, like a checking account. There was $160 worth of American Express Company checks.

Q What did you do with them? A I give him that too. I gave him everything I had in my pocket.

Q What happened then? A Then he says to me, "Take me to the register," which was in front of that back, so we went to the register and I opened the register and with his left hand he held me, I mean, with the knife that I have seen.

Q Where did he hold you with the knife? A On this side.

[fol. 11] Q Indicating your left side? A Left side.

Q Yes? A Because I had to use my right hand to open the register, as soon as I pushed the button the drawer pulled out. He took everything I had there and put is in his jacket pocket and with that he says to me, "Have you got a bathroom?" I said "Yes, the bathroom is right behind the door to the back," and he put the three of us into the bathroom and disappeared.

A minute later I got out of the bathroom and I ran out and started to yell for help. I started to yell for

help. I was all excited, naturally. I ran to a corner opposite me, the corner luncheonette. I says to the man who owns the luncheonette, "Please call the Police Department. I was just held up."

With that I ran back and noticed across the street there was a radio car with two or three officers in it, so as soon as I saw them, I called them in. They just happened to be parked there. They didn't come from the precinct on account of the call. I called them in. They calmed me down, "Take it easy," and all that, and they called the detectives on my phone and they came over in a few minutes and that's when the whole thing started.

Q How much money did this man take? A $248.50. We have a tape. There was an extra $20 petty cash.

Q You say your wife was in the rear too? A [fol. 12] Right.

Q Did he do anything to your wife? A No. My wife went over to him and pushed him and said, "What do you want from my husband?" She thought it was a joke. And he says to her, "Lady, better sit down and take it easy." Naturally she realized what it was then.

Q Mr. Adelman, were you frightened when you saw this knife pointed at you? A I was, quite a bit.

MR. LUBKIN: I object, it is immaterial.

THE COURT: Sustained.

Q Did you see this man again? A Next time, you mean after that? After that I saw him at the precinct, 66th Precinct.

Q When was that? A This was on a Tuesday—Friday afternoon.

Q That would be October 14th? A That's correct.

Q And will you look around the courtroom? Do you see the man now? A I do.

THE COURT: You mean the man that held you up?

THE WITNESS: I do.

Q Will you step down from the stand and point him out?

(Witness complies.)

MR. ROSENBERG: Standing in front of the defendant and pointing to and indicating the defendant.

[fol. 13] THE DEFENDANT: It's a lie, your Honor.

(Witness resumes stand.)

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LUBKIN:

* * * *

[fols. 14-21] * * *

[fol. 22] CROSS EXAMINATION

BY MR. LUBKIN:

Q Did the police pick you up on October 14th and bring you down to the 66th Precinct? A To the 66th Precinct. They called me and I came over there.

Q By yourself, Mr. Adelman? A No, with the salesgirl.

Q With the salesgirl? A That's right.

Q Did you see this defendant? A I did.

Q At the precinct? A I did.

Q Where was he? A He was in a little room in the back there. They brought him out.

Q Did the police say anything to you on the telephone why you should come down to the precinct? A Yes, they told me to come down to identify the man.

[fol. 23] Q Would you tell the Court specifically what they said? A They called me to come over to identify the man to see if that is the man.

Q Did any police speak to you when you entered the precinct? A I walked into the room and they brought him out from the back or something—

Q Did you go in and identify yourself to somebody there? A They were waiting for me. They called me so naturally I knew the man, I knew the detective and I knew the other detective on the case so I walked into that room.

Q Did the detective tell you anything at all before you walked into that room? A He didn't say nothing to me.

Q Did you say anything to him? A I said I wouldn't like to even look at him. He says, "Well, you got to do some identification," so when the man came out from that room, from the little room, I didn't have to identify him, he identified me and the girl.

THE COURT: What do you mean, he identified you?

THE WITNESS: The detective says to him—

THE COURT: To whom?

THE WITNESS: To this defendant. The detective [fol. 24] said to the defendant, "Do you know these people?" He says, "Yes, I held them up."

THE DEFENDANT: That's a lie.

THE COURT: Behave yourself or I will have you restrained. Listen to what the Judge says. You maintain order or I will have you restrained and I know how to do it.

A He says, "Those are the people that I held up, the dress shop on the corner of 49th Street and 13th Avenue." That is the words he used.

Q Did you say anything to the police at that time or to the defendant? A All I said "That is the man." There was nothing else to say.

* * * *

[fols. 25-29] * * *

[fol. 30] Brooklyn, New York
August 29, 1961

(Same appearances as heretofore noted.)

(Jurors return; roll called; trial resumed.)

GERTRUDE ADELMAN, called as a witness by the People, having been first duly sworn by the Clerk of the Court, and stating her address as 1347 48th Street, Brooklyn, New York, testified as follows:

MR. ROSENBERG: Can we have these blow-ups posted?

THE COURT: Any objection?

MR. LUBKIN: Are these the same as yesterday?

THE COURT: Yes.
MR. LUBKIN: All right.

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Madam, are you the wife of Harry Adelman? A Yes.

Q The owner of that dress shop on 13th Avenue? A Yes.

Q On October 11, 1960, at about 5:30 in the afternoon, were you in the rear of the store? A Yes, I was.

[fol. 31] Q What were you doing? A I was sewing at the sewing machine.

Q Was the sewing machine in operation at the time? A Yes, sir.

Q Did you see something happen? A Yes, I saw my husband and a gentleman come in the back and I was running the machine and they stood there and my husband came in back of me—there is a little section in back of where I sit and this man said, "I want to see you," and he was holding the saleslady.

Q The man said to whom "I want to see you"? A To my husband.

Q You say the man was holding the saleslady? A Yes.

Q Show the jury, please, how the man was holding the saleslady. (Witness complies.)

Q Where was the saleslady, by the way? A Standing at the ironing board.

Q Show us how he was holding her.

(Witness complies.)

MR. ROSENBERG: Indicating the right hand around the right shoulder of the salesgirl and he had a knife in the other hand.

Q A knife in the left hand and doing what, pointing [fol. 32] the knife at the ribs of the salesgirl? A Yes.

Q Where was the salesgirl? A Standing at the ironing board which is near—before the sewing machine. I face the ironing board.

Q Your husband was behind you? A Yes.
Q Is there a frigidaire behind you? A Yes.
Q Was your husband near that frigidaire? A That's right.
Q Did you see the knife? A Oh, yes.
Q Will you describe as best you can what kind of a knife it was? A About four, five inches, narrow, shiny silver.
Q The blade? A Yes.
Q You saw the whole knife? A Oh, definitely.
Q When this man said that to your husband, you come here, what happened then? A Well, I thought he was fooling so I says, "Leave my husband alone," and I pushed him.
Q You pushed this man? A I got up from my chair and pushed him and said, "You leave my husband alone. That's all. He didn't answer me. Then he said, "I'll give it to this girl." He held the girl and my husband said, "Just a minute," and he came out and he says, "Let me have everything you have in your pocket."
Q Who said? A The fellow did.
[fol. 33] Q What did your husband then do? A Gave his everything he had in his pocket.
Q Money? A Yes, whatever he had. He had papers and money and things like that. He had a Diner's Club, he had various things in his pockets.
Q You saw a Diner's Club card? A He always carried it.
MR. LUBKIN: I object, your Honor, that is an assumption.
THE COURT: Don't lead.
Q What did you see your husband turn over to this man? A Everything he had in his pockets including money and a Diner's Club and everything else.
Q You mean a Diner's Club credit card? A You know what I mean, the card, the book, whatever you call it.
Q Then what happened? A Also the Express money orders.
Q Express money checks? A That's right.

Q Go ahead. A Then he said, "Take me to your register."

Q Who is he? A The fellow that held us up.

Q Yes? A I stayed in the back with the salesgirl.

Q Was anything said to you about where you were [fol. 34] to stay? A No, no, he just said "Stay here."

Q He said that? A Yes, and he took my husband to the front. The register is in the front of the store, towards the back of the front, and he emptied the register.

Q Did you remain behind in the rear? A Yes, sir, with the girl. Then he came back with my husband again in the back of the store which is a workroom and he says, "Where's your bathroom," and we have a little bathroom and he put the three of us in the bathroom and then he walked out.

Q Now, when the two of them walked from the rear to the front of the store, did you see the knife at that time? A I tell you the truth, I was afraid to look. I didn't even move.

Q What happened after you were put into the bathroom? A We stayed there, I don't know, a minute or two minutes. I don't really know, and we opened it and my husband ran out and the salesgirl called up the police and my husband ran out and there was a police car parked on the other side of the street.

Q Now, do you see that man in the store—I'm sorry, in the courtroom? A I am sure it is this fellow here.

Q Will you step down, please, from the witness stand [fol. 35] and point out the man? A (Witness complies) It is this man (indicating).

MR. ROSENBERG: She is at the table where the defendant is seated and she is pointing to and indicating the defendant.

THE COURT: Return to the stand, Madame, please. You may cross examine.

* * * *

[fols. 36-46] * * *

[fol. 47] ANITA WALDINGER, called as a witness by the People, having been first duly sworn by the Clerk of the Court, and stating her address as 1315, 48th Street, Brooklyn, New York, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Madame, are you the saleslady in the Chapeaux de Mode located on 13th Avenue, Brooklyn? A Yes.

Q 4822 13th Avenue, Brooklyn? A Yes.

Q How long have you been a salesgirl there? A Five and half to six years.

Q On October 11, 1960, at about 5:30 in the afternoon, were you in the rear room? A Yes, I was.

Q Tell us please where you were and what happened. A I was at the ironing board and when Mr. Adelman came in, he said "It's a stickup," and he walked in and this fellow, he came in and took me around by the neck and had a knife against my ribs.

Q You saw the knife, Madame? A I sure did.

[fol. 48] Q Can you describe the knife? A Well, it was a long, shiny knife.

Q Yes? A That's all I know.

Q Go ahead. A He held it against my ribs and he said to Mr. Adelman, "You I want. If you don't come out, I'll let her have it."

Q Where was Mr. Adelman then? A He was in the back near the refrigerator.

He came out and that's when he let go of me. Then he walked—

Q What happened when Mr. Adelman came out? A Mr. Adelman emptied out his pockets. He told him to empty out his pockets and give him everything he had in the pockets. He did that.

Q Did you see what he did when he emptied out his pockets? A He gave him everything he had in his pockets, the wallet, and he gave him everything he had, and then he walked—told him to walk slowly and told us to remain in the back. A few minutes later he came back and locked us into the bathroom. He told us to stay there

for a while. Then when we walked out of the bathroom, I went to the telephone to call the police and Mr. Adelman went outside to get some help.

Q Did you subsequently go to a police station? A No.

[fol. 49] Q Subsequently means afterwards. A That night we went to the police station and looked at pictures.

Q Did you see somebody in the police station? A Just the detectives.

Q Did you see a man in the police station? A When I went to identify him, I did.

Q When was that? A That was a few days after the hold-up.

Q Now, did you hear this man say anything? A Yes, this man—the detective asked the man, "How do you know these people?" and he says, "From the dress shop."

Q Who was there? A Myself, Mr. Adelman and the two detectives.

Q Now, do you see the man in the courtroom who held the knife against your ribs and who said to the detectives in your presence, "I know these people from the dress shop"? A Yes, I do.

Q Will you stand up and step around, please, and point him out? A (Witness complies.)

MR. ROSENBERG: Pointing to the defendant at the defense table.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LUBKIN:

* * * *

[fols. 50-54] * * *

[fol. 55] Q On what date did you go to the precinct to identify this defendant? A I don't remember the date but it was on a Friday.

Q Morning, afternoon, evening? A It was in the morning sometime.

Q Did anybody call you to come to the precinct? [fol. 56] A Yes.

Q What did they tell you? A Nothing.

Q Did a detective, an officer of the Police Department call you? A He didn't call me. He called Mr. Adelman.

Q Then you didn't speak to him? A I didn't speak to no one.

Q What did Mr. Adelman tell you after the phone call? A Just to go down to the precinct.

Q Did you go with Mr. Adelman? A Yes.

Q Is that the first time you went down to the precinct to identify anybody? A Yes.

Q When you went to the 66th Precinct, did you speak to anybody, any detective? A Yes, I did.

Q What did the detective tell you? A The detective just asked this boy—

THE COURT: No, no.

Q Nobody spoke to you? A No.

Q Did you identify yourself to anybody? A Yes, they called me down.

Q You walked into the precinct. Did you identify yourself to anybody that you are Mrs. So and So? A To one of the detectives, yes.

Q What did the detective tell you? A Just to come [fol. 57] and identify the man, that's all.

Q The man? A Yes.

Q That's all the detective said? A That's all.

Q Where did the detective take you within the precinct? A To a little room.

Q Who was present in that room? A Mr. Adelman and I and one of the detectives, or two, I don't remember.

Q That's all? A That's all.

Q Was this defendant there? A Then they brought him out.

Q You went into the room and then they brought him out? A That's right.

Q Did you actually go into the room? A No, I was standing by the door.

Q What did you say to the detective then? A Just that that's the man.

Q Are you referring that that's the man that was in the store on October 11th? A That's right.

Q Did you have a police line-up? A I beg your pardon?

Q Did the detective—

THE COURT: Was he the only man in the room there with the detective?

[fol. 58] THE WITNESS: Yes.

Q Between October 11th and October 14th, did you go down to any police precinct to identify anybody? A No, just pictures.

MR. LUBKIN: I have no further questions.

THE COURT: Step down.

VITO LENTINI, called as a witness by the People, having been first duly sworn by the Clerk of the Court, and stating his address as Room 409, Municipal Building, testified as follows:

DIRECT EXAMINATION BY MR. ROSENBERG:

Q Mr. Lentini, are you a stenographer, Civil Service stenographer, in the employ of the District Attorney of Kings County? A Yes, I am.

Q How long have you been serving in that capacity? A Five years.

Q Have you in that capacity taken statements of witnesses and defendants? In other words, the District Attorney asks questions and you record them on a stenotype machine and you also record the answers of defendants; is that right? A That's right.

Q Have you testified before Grand Juries in the courts of this county? A Yes, I have.

Q Many times? A Yes.

Q Now, on October 14, 1960, were you present at [fol. 59] the 70th Precinct when Assistant District Attorney Postal questioned this defendant? A Yes, I was.

Q Did you record on your stenotype machine the questions which Mr. Postal asked the defendant and the answers which the defendant gave to Mr. Postal to those questions? A I did.

Q Did you then transcribe those questions and answers? A Yes, I did.

Q Did you compare the transaction with your original notes? A Yes.

Q Is it an accurate transcription? A It is.

Q Will you look at it, please? Is that an accurate transcription of the questions put by Assistant District Attorney Postal and the answers given by this defendant to Mr. Postal? A Yes, it is.

OFFER IN EVIDENCE

MR. ROSENBERG: I offer it in evidence.

MR. LUBKIN: I object, your Honor, this is not the best evidence.

THE COURT: Overruled.

MR. LUBKIN: I will take an exception.

THE COURT: Have you read the Randazzo case?

MR. LUBKIN: Exception on the ground this is not the best evidence.

THE COURT: I refer you to the Randazzo case.

Read your notes and compare. You are reading from [fol. 60] the original notes that you made in the station house on the night the defendant was arrested, right?

THE WITNESS: Yes.

THE COURT: And the questions that were put to him by the Assistant District Attorney and the answers made?

THE WITNESS: Yes.

THE COURT: You took all of these things down on a stenotype machine, the same as Miss Shanser is using here in this courtroom, our shorthand reporter?

THE WITNESS: Right.

THE COURT: Now read your original notes.

MR. ROSENBERG: For the record, your Honor, Statement No. 2294.

THE WITNESS: (Reading) "Q What is your name? A Michael Vigners.

"Q Where do you live? A 970 42nd Street.

"Q How old are you? A Thirty-one.

"Q On October 11, 1960, did you go to a dress shop at 4822 13th Avenue in Brooklyn? A Yes.

"Q What time did you go there? A About four o'clock, I think.

"Q Could it be as late as 5:30 or later? A No.

"Q Did you go alone? A Yes.

[fol. 61] "Q Did you have any weapon with you? A A toy gun.

"Q Where did you have the toy gun when you went into the store? A My pocket.

"Q When you got into the store, how many people were there? A I only saw two.

"Q What did you do with reference to the gun; did you take it out of your pocket? A Yes.

"Q Then what did you do with it? A I announced it was a hold-up.

"Q Did you point the gun at anybody? A It wasn't actually necessary but I guess I did.

"Q You waved it at him, is that the idea? A Yes.

"Q Did you ask the man for his money? A Yes.

"Q How much money did you get from him? A I got $93.

"Q Where did he take the money from that he gave you? A Some I think was from the register, some from his pockets, I guess.

"Q Did you say anything to the man after he gave you the money? A No, I just walked out.

"Q Was anybody involved in this job with you? [fol. 62] A No.

"Q How did you happen to pick this particular place? A The spur of the moment."

THE COURT: Do you wish to cross examine the witness?

MR. LUBKIN: Yes, your Honor.

CROSS EXAMINATION

BY MR. LUBKIN:

Q Was anybody else in the room when you took these notes? A No one was present.

Q Was there any detective present? A The detectives weren't in.

Q Mr. Lentini, is it possible that someone else gave you those questions and answers?

MR. ROSENBERG: I object to the form.

THE COURT: Sustained.
MR. LUBKIN: Exception.
THE COURT: Put the question in another form.
Did anyone give you these questions and these answers other than—is that what you mean?
MR. LUBKIN: That's right.
THE COURT: You mean did he cook up these questions and answers? This is all a fake, is that what you mean?
[fol. 63] MR. LUBKIN: Up to the fourth question is correct.
THE COURT: Is the purport of your question that the stenographer is producing a fake record here?
MR. LUBKIN: No.
THE COURT: Go ahead.

BY MR. LUBKIN:

Q Is this a fake record? A No, of course not.
MR. LUBKIN: I have no further questions.
THE COURT: Step down.
DETECTIVE JOHN GILLEN, Shield No. 747, 66th Squal, called as a witness by the People, having been first duly sworn by the Clerk of the Court, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Detective Gillen, how long have you been in the employ of the Police Department of the City of New York? A Twelve years.
Q How long have you been serving as a detective? A Nine and a half years.
Q When did you first receive this case, the report of this case, Detective? A On October 11th about 5:45 p.m.
[fol. 64] Q When did you arrest this defendant? A October 14th at about 3:00 p.m.
Q Where? A At the 66th Detective Squad.
Q Did you have a conversation with the defendant? A I did, yes, sir.

THE COURT: Tell us what you said to him and what he said to you.

THE WITNESS: I asked the defendant whether he had committed the hold-up at the place and he stated he had.

THE COURT: What place?

THE WITNESS: 4822 13th Avenue, and he stated he had. I asked him what he had used. He stated he had used a toy gun. He stated that he took the money from the complaint and that he made his escape along 49th Street, to the 49th Street elevator station. Later on in the conversation he stated he didn't use a toy gun but had used a knife.

BY MR. ROSENBERG:

Q When was that? A That was in the patrol wagon the next day going to court.

Q Did he say what he had done with the knife? A He stated he threw it away.

Q Now, did he tell you how much money he had obtained? A He stated he obtained about $93.

[fol. 65] Q Now, at any time was Mr. Adelman and Mrs. Waldinger present? A Yes, sir, they were brought in.

THE COURT: Just take it nice and easy. Be very careful about the questions.

MR. ROSENBERG: I know, your Honor, I am referring only to what the defendant said in the presence of Mr. Adleman and Mrs. Waldinger.

THE COURT: Be careful, Officer, tell us only what the defendant did or said, nothing else.

THE WITNESS: When they walked in the office, I said, "Michael, do you know who these people are?"

BY MR. ROSENBERG:

Q That is the defendant? A That's right, and he said, "That's the man I held up."

Q That was Mr. Adelman, Harry Adelman? A Yes, sir.

THE COURT: You may cross examine.

CROSS EXAMINATION

BY MR. LUBKIN:

Q Detective Gillen, where was the defendant first arrested? A He was taken into the 17th Squad and then he was brought to the 66th.

Q Where is that? A East 49th Street, Manhattan. Then he was brought into the 66th Detective Squad where we questioned him and placed him under arrest.

[fol. 66] Q Did you advise him of his right of counsel?

MR. ROSENBERG: I object to the question.

THE COURT: Sustained.

MR. LUBKIN: Exception.

BY MR. LUBKIN:

Q Did you call Mr. Adelman to come down to the precinct to identify the defendant? A Yes, sir.

Q What did you tell Mr. Adelman on the phone and what did he tell you? A I stated we had a suspect in the office.

Q What was the suspect wearing when you picked him up? A If I recall correctly, a black shirt with white in it.

Q Did he have a hat? A No, sir.

Q Jacket? A Not that I recall, no, sir.

Q Did he have a knife on him? A No, sir.

Q Did he have a letter opener on him? A No, sir.

Q Relating to the conversation that you just testified to, did Mr. Adelman or Mrs. Waldinger say anything to you in the defendant's presence? A They stated he was the man that held them up.

Q Was there any other suspect standing in that vicinity? A No, sir.

Q Isn't it customary, Detective, to hold a line-up [fol. 67] when you have a suspect?

MR. ROSENBERG: I object to the question.

THE COURT: Overruled.

A It is customary but on that particular day we had nobody in the office and we didn't do it.

THE COURT: Which came first, the statement of the defendant, as you testified, "This is the man I held up," or the statement of Mr. Adelman? Which came first?
THE WITNESS: The statement of the defendant.

BY MR. LUBKIN:

Q Did you have Mr. Adelman or Mrs. Waldinger at any prior time come to identify any other suspects down to the precinct? A No, sir, I did not.
Q Do you know the name of the detective that escorted the defendant to the 70th Precinct? A To the 66th Precinct?
Q Is it not true that the defendant went from the 66th Precinct to the 70th Precinct? A Oh, yes, for detention he did.
Q Do you know the name of the detective that escorted him to the 70th Precinct? A No, sir, I do not.
Q Was one of the detectives a Detective Corvelli? A It may have been. I can't recall exactly who escorted

[fol. 68] him.
Q How much money did you find on the defendant when you picked him up?
MR. ROSENBERG: Object to the question—October 14th.
THE COURT: Sustained. This was four days after the event.
MR. LUBKIN: Three.
THE COURT: Objection sustained.
MR. LUBKIN: Exception.

BY MR. LUBKIN:

Q Did you find anything on the defendant's person?
MR ROSENBERG: Objection to the question, four days later, three days later.
THE COURT: Sustained.
MR. LUBKIN: Exception.
THE COURT: This was four days after the alleged robbery occurred; four days after the alleged robbery is immaterial.

BY MR. LUBKIN:

Q Did you ask the defendant any other questions other than the ones that you testified to here?

THE COURT: Do you press that question, Counselor?

[fol. 69] MR. LUBKIN: Yes, I'd like an answer.

THE COURT: That may open a door to an irrelevant matter, but if you insist on asking the question, all right. He may answer.

A Offhand I don't recall any other questions other than in regard to the hold-up.

Q Did you ask him any other questions than the ones you testified to here today?

THE COURT: First let him answer the question, did you ask him any other questions.

A I presume I did ask him some other questions in regard to it. I asked him how he escaped. I can't recall any right now that I asked him.

BY MR. LUBKIN:

Q Did any other detective in your presence ask him any questions that he gave answers to that you overheard? Did you hear anybody else in your presence ask him any questions that the defendant gave answers to? A No, sir, not that I recall.

Q Were you present when the alleged statement that was formerly introduced into evidence was made? A The statement to Mr. Postal, no, sir, I was not.

Q You were not? A No, sir.

MR. LUBKIN: I have no further questions.

(The witness was excused.)

[fol. 70] EDWARD NEMETH, called as a witness by the People, being first duly sworn by the Clerk of the Court, and stating his address as 207 Clinton Street, Manhattan, testified as follows:

DIRECT EXAMINATION

BY MR. ROSENBERG:

Q Mr. Nemeth, how old are you? A Twenty.

Q Do you know this defendant, Michael Vignera? A Yes.

Q How long have you known the defendant? A I knew him for about five months.

Q Were you employed in a firm by the name of Fascination on 42nd Street, Manhattan? A 49th Street.

Q What kind of a firm is that? A It is like a game of skill, competing against other players to win prizes.

Q Did you meet the defendant there? A Yes.

Q Now, on October—sometime in October of 1960, did you see the defendant at your place of employment? A Yes.

Q Can you fix a date? A October 14th about 4:00 p.m.—I mean 4:00 a.m., in the morning.

THE COURT: Was it October 14th?

MR. ROSENBERG: That was a Friday.

THE WITNESS: Yes.

[fol. 71] Q Four o'clock in the morning? A Yes.

Q Did you have a conversation with the defendant at that time? A Yes.

Q Can you tell the Court and Jury, please, what the conversation was? A Well, he showed me a Diner's Club Card and told me if I knew anyone who wanted to buy it or if I wanted to buy it, so I told him I couldn't buy it, but I'd try to find out if I could find somebody who wanted to buy it, but we couldn't find anybody who wanted to buy it, so he told me, well, if you want to make some money with it, we can go in the morning, the next morning. He give me an address and we'd go to a store and get some jewelry with the card and then he'd give me some money for it.

Q I show you this Diner's card and ask you whether this is the card that he showed to you? A Yes.

MR. ROSENBERG: I offer it in evidence, subject to connection.

THE COURT: It may be received subject to connection, subject to a motion to strike it out if not connected.

(Received in evidence.)

Q Did you see the name of Harry Adelman on that Diner's car? A I did.

[fol. 72] MR. ROSENBERG: May I pass it to the jury, your Honor?

THE COURT: Pass it to the jury.

(Jury examines exhibit.)

(Marked People's Exhibit 5 in evidence.)

Q Now, tell us the rest of the conversation you had with the defendant. A Well, the next day he gave me his address to call him up the next day. See, it was four a.m. in the morning when he give it to me. I put the address on the back of my pay slip.

Q What was the address? A 14th Street and Third Avenue—I don't remember the number.

Q Was it a hotel? A Yes.

Q Well, go ahead. A The next day about eleven o'clock in the morning—

Q In the morning, that would still be October 14th? A Yes.—I met him at the hotel. I woke him up. I said, okay, maybe I can get some money from it. He said, "You'll have to go to the jewelry store. I'll show you a jewelry store." So we went to the jewelry store on Madison Avenue. I walked in and he stood outside, and I asked the guy for a pair of earrings in the window. So he says, well, he'd have to find out if this card was okay or not, if it's yours. So I told him, "All right, you can call up [fol. 73] and find out if it was all right or not." So he did, and while I was waiting, I was arrested in the store.

Q Had the defendant said anything to you about this Diner's card? A He said he could get all he wanted. It belonged to his brother-in-law. His brother-in-law worked in the Diner's Club Company.

Q Did anyone point out this jewelry shop to you? A We were both walking up the Avenue and he said, "Here's the place where they use Diner's Club Cards."

Q Where did the defendant remain? A He remained outside.

Q When you were arrested, then you were taken out by a policeman, is that correct? A Yes.

Q Did you see the defendant there outside? A I did not.

Q He was no longer there? A No.

* * * *

[fols. 74-145] * * *

[fol. 146] THE COURT'S CHARGE TO JURY

Therefore the first question before you is this: did he make a confession (a), to the police officer, (b) to the Assistant District Attorney, and is there any evidence that any coercion was used upon him or any violence or intimidation, either physical or psychological. It must be proven beyond a reasonable doubt that the confession was a voluntary confession and you will be guided by the evidence.

If the confession under consideration is voluntary, then it is for you to determine whether it is true. If not true in whole, is it true in part. And if it is true in part, whether that part which remains is true and is also voluntary is tantamount to a confession. Confession is an admission of the guilt of the crime charged voluntarily made and which admission is true. That is the law with reference to confessions. There is no law that says that a confession has to be in writing and signed by the defendant or signed before a Notary Public. There is no such law. Confession may be by word of mouth. It need not even be recorded by a stenographer. There is no formality about a confession. The law doesn't say that the confession is void or invalidated because the police officer [fol. 147] didn't advise the defendant as to his rights. Did you hear what I said? I am telling you what the law of the State of New York is.

Under our law, a police officer is not required to tell him "You don't have to answer unless you wish and everything you say can be used against you." The law does not require that that warning be given by the police officer in the State of New York. If it is not given, it does not because of the failure to give such advice invalidate the confession.

* * * *

[fols. 148-159] * * *

[fol. 160]

IN THE COUNTY COURT, KINGS COUNTY

STATEMENT No. 2294 FOLIO NO. 91

STATEMENT TAKEN AT THE 70 PRECINCT, BROOKLYN, NEW YORK, ON OCTOBER 14, 1960, COMMENCING AT ABOUT 11:05 P.M., BY ASSISTANT DISTRICT ATTORNEY POSTAL.

Present: No one.

HEARING REPORTER: Vito Lentini.

BY MR. POSTAL:

Q What is your name? A Michael Vignera.
Q Where do you live? A 970 42nd Street.
Q How old are you? A Thirty-one.
Q On October 11, 1960, did you go to a dress shop at 4822 13 Avenue, in Brookyln? A Yes.
Q What time did you go there? A About 4:00 o'clock, I think.
Q Could it be as late as 5:30 or later? A No.
Q Did you go there alone? A Yes.
Q Did you have any weapon with you? A A toy gun.
Q Where did you have the toy gun when you went into the store? A My pocket.
Q When you got into the store how many people were there? A I only saw two.
Q What did you do with reference to the gun? Did you take it out of your pocket? A Yes.
Q Then what did you do with it? A I announced it was a holdup.
Q Did you point the gun at anybody? A It wasn't actually necessary but I guess I did.
[fol. 161] Q You waved it at him, is that the idea? A Yes.
Q Did you ask the man for his money? A Yes.
Q How much money did you get from him? A I got $93.00.

Q Where did he take the money from that he gave you? A Some, I think, was from the register; some from his pockets, I guess.

Q Did you say anything to the man after he gave you the money? A No, I just walked out.

Q Was anybody involved in this job with you? A No.

Q How did you happen to pick this particular place? A The spur of the moment.

Ended: 11:08 p.m.

[fol. 162]

IN THE SUPREME COURT: KINGS COUNTY
CRIMINAL TERM: PART VII

PEOPLE OF THE STATE OF NEW YORK

against

MICHAEL VIGNERA, DEFENDANT

Ind. No. 4014—1960

Brooklyn, N. Y.

TRANSCRIPT ON RESENTENCE—February 6, 1963

BEFORE:

HON. SAMUEL S. LEIBOWITZ, Justice

APPEARANCE:

ARTHUR LUBKIN, Esq., for the Defendant.

* * * *

[fol. 163] THE COURT: You may make your motion to set the sentence aside, counsel.

MR. LUBKIN: Your Honor, I move to set the sentence aside due to the fact that the United States District Court, Western District of New York, in an order dated December 31, 1962, by Judge Henderson, held that the

conviction in Florida, Dade County, in 1947, is invalid under constitutional grounds. Therefore, Michael Vignera should be sentenced as a second felony offender as of the time you originally sentenced him.

I would like to add something, your Honor. Due to the fact that the Florida conviction at the time of sentence played an integral part in your decision in the sentencing, and due to the fact that in actuality now, it is held to be unconstitutional, I feel that you should reconsider your previous sentencing in light of these late developments.

Therefore, I request the Court to lower the sentence that was originally given, which was 30 to 60 years.

THE COURT: The main point of the sentence is not the technical adjudication as to whether the defendant is [fol. 164] a second, third, fourth or fifth or sixth felony offender. We are not sentencing technicalities. We are sentencing the criminal, and this man is a veteran criminal from way back.

I sentenced him to the New York City Reformatory for burglary in 1945. Then in 1949 he was sentenced to the penitentiary for conspiracy to commit armed robbery. In 1952 he was arrested for burglary and assault in Los Angeles. The matter was dismissed. In 1953, he was convicted of robbery and sentenced by the Late Judge Marasco to a term of five to ten years in Sing Sing, and in 1960, when he got out of Sing Sing, just a short time after he was paroled, he was locked up for assault, and the charge was withdrawn.

Arraign the defendant for sentence.

The sentence heretofore imposed on November 3, 1961, is hereby vacated and set aside, and the defendant will be resentenced.

THE CLERK: What is your name?

THE DEFENDANT: Michael Vignera.

THE CLERK: Michael Vignera, if there is any legal cause or other reason why judgment of the law should not be pronounced upon you, say it now and address yourself [fol. 165] to the Court.

Is there anything you want to say, Michael Vignera, or do you want your attorney, Mr. Arthur Lubkin, to speak for you, or both of you may speak.

THE DEFENDANT: I am not guilty of the crime, your Honor.

THE COURT: I could give this man, as a second offender, 59 to 60 years in States Prison. He was armed with a dangerous knife, and I could add an additional sentence of 5 to 10 years, but I will adhere to the original sentence.

The defendant is sentenced to a term of 30 to 60 years in Sing Sing.

The defendant is remanded.

(Defendant remanded)

[fol. 166]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

ORDER OF THE APPELLATE DIVISION—May 4, 1964

By Beldock, P.J.: Kleinfeld, Christ, Brennan and Hill, JJ.

PEOPLE, &C, res, v. MICHAEL VIGNERA, ap—Appeal by defendant: (1) from a judgment of the former County Court, Kings County, rendered November 3, 1961, after a jury trial, convicting him of robbery in the first degree and sentencing him, as a third felony offender, to serve a term of thirty to sixty years; and (2) from a judgment of the Supreme Court, Kings County, rendered February 6, 1963, after a hearing, resentencing him, as a second felony offender, to serve the same term of imprisonment. Judgment of February 6, 1963, on resentence, affirmed. No opinion. Appeal from original judgment of November 3, 1961, dismissed as moot.

[fol. 167]

IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION—

SECOND JUDICIAL DEPARTMENT

Appeal # 3171

* * * *

Present—HON. GEORGE J. BELDOCK,
Presiding Justice.

" PHILIP M. KLEINFELD,
" MARCUS G. CHRIST,
" ARTHUR D. BRENNAN,
" L. BARRON HILL,
Justices.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

MICHAEL VIGNERA, APPELLANT

ORDER ON APPEALS FROM JUDGMENTS.—May 4, 1964

The above named Michael Vignera, defendant, in this action having appealed to the Appellate Division of the Supreme Court from a judgment of the former County Court, Kings County, rendered November 3, 1961, after a jury trial, convicting him of robbery in the first degree and sentencing him, as a third felony offender, to serve a term of 30 to 60 years; and the said defendant having also appealed from a judgment of the Supreme Court, Kings County, rendered February 6, 1963, after a hearing, resentencing him, as a second felony offender, to serve the same term of imprisonment, herein, and the said appeals having been argued by Mr. Robert S. Rifkind of Counsel for appellant, and argued by Mr. William I. Siegel, Assistant District Attorney, of Counsel for respondent, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed, and made a part hereof:

It is Ordered and Adjudged that the judgment of February 6, 1963, on resentence, so appealed from, be and the same hereby is unanimously affirmed, and it is

Further Ordered that the appeal from original judgment of November 3, 1961, be and the same hereby is dismissed as moot.

Enter:

JOHN J. CALLAHAN
Clerk.

Filed May 13 1964

[fol. 168]

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 169]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

MICHAEL VIGNERA, APPELLANT

Argued March 8, 1965

Crimes—statement made before arraignment—defendant was convicted of robbery in first degree—contentions by defendant that admission into evidence of statement made by him during interrogation prior to arraignment violated his privilege against self incrimination and constituted denial of due process, that admission of testimony as to statements made by him during period when his arraignment had been unreasonably delayed constituted denial of due process, and that trial court committed reversible error in making certain statement with reference to testimony of prosecution witness and in foreclosing defense counsel from making further inquiry with respect thereto—judgment of conviction was properly affirmed.

People v. *Vignera*, 21 A D 2d 752, affirmed.

DECISION—decided April 15, 1965.

APPEAL, by permission of an Associate Judge of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department, entered May 4, 1964, affirming a judgment of the Supreme Court (SAMUEL S. LEIBOWITZ, J.), entered in Kings County, which resentenced defendant as a second felony offender, rendered upon a verdict which, following a trial in the former Kings County Court, convicted defendant of the crime of robbery in the first degree. The indictment charged, in part, that on October 11, 1960 defendant, while armed with a dangerous knife, unlawfully took checks and currency from one Harry Adelman. In the Court of Appeals defendant argued that the admission into evidence of a statement made by him during an

interrogation by an Assistant District Attorney prior to his arraignment deprived him of his right to counsel, violated his privilege against self incrimination and constituted a denial of due process since he had not, at the time of making the statement, been advised of his right to counsel or his privilege against self incrimination; that the admission of testimony as to statements made by defendant during a period when his arraignment had been unreasonably delayed constituted a denial of due process, and that the trial court committed reversible error in stating, with reference to the testimony of a prosecution witness who had received a suspended sentence in a criminal prosecution in New York County, that the Kings County District Attorney had nothing to do with the witness' case in New York County and in foreclosing defense counsel from inquiring into the possibility that [fol. 170] the witness' suspended sentence and testimony upon defendant's trial were the product of an understanding between the witness and the prosecutors involved. The People argued that defendant had no constitutional right to be advised of his right to counsel or his privilege against self incrimination during the interrogation period prior to his arraignment; that the alleged delay in arraignment would not, in and of itself, render inadmissible any statements made by defendant during the period of the alleged delay, and that, although the trial court erred in making the statement with reference to the testimony of the prosecution witness who had received a suspended sentence in New York County and in foreclosing defense counsel from making further inquiry with respect thereto, the error did not require reversal since defendant's guilt was established beyond a reasonable doubt without the testimony of said witness.

Robert S. Rifkind and *Anthony F. Marra* for appellant.

Aaron E. Koota, District Attorney (William I. Siegel of counsel), for respondent.

Judgment affirmed; no opinion.

Concur: Chief Judge DESMOND and Judges DYE, FULD, VAN VOORHIS, BURKE, SCILEPPI and BERGAN.

[fol. 171]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 15th day of April in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding*.

RAYMOND J. CANNON, *Clerk*.

REMITTITUR—April 15, 1965

Filed May 18 1965

[fol. 172]

THE PEOPLE &C., RESPONDENT

vs.

MICHAEL VIGNERA, APPELLANT

BE IT REMEMBERED, That on the 10th day of November in the year of our Lord one thousand nine hundred and sixty-four, Michael Vignera, the appellant—in this cause, came here unto the Court of Appeals, by Anthony F. Marra and Robert S. Rifkind, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And The People &c., the respondent—in said cause, afterwards appeared in said Court of Appeals by Aaron E. Koota, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 173]

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert S. Rifkind, of counsel for the appellant—, and by Mr. William I. Siegel, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 174] THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

/s/ Raymond J. Cannon
Clerk of the Court of Appeals of the State of New York

[Clerk's Certificate to foregoing paper omitted in printing.]

[fol. 175]

IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

* * * *

Present, HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 478

THE PEOPLE &C., RESPONDENT

vs.

MICHAEL VIGNERA, APPELLANT

ORDER AMENDING REMITTITUR—May 20, 1965

A motion to amend the remittitur in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted, the return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

> Upon the appeal herein there were presented and necessarily passed upon questions under the United States Constitution, viz:
>
> (1) Whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;
>
> (2) Whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted

a denial of his rights under the Fourteenth Amendment to the United States Constitution.

The Court of Appeals held that no rights of defendant-appellant under the Fourteenth Amendment to the United States Constitution had been violated.

AND the Supreme Court of Kings County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

[SEAL]

* * * *

[fol. 176]

SUPREME COURT OF THE UNITED STATES

No. 397 Misc., October Term, 1965

MICHAEL VIGNERA, PETITIONER

v.

NEW YORK

On petition for writ of Certiorari to the Court of Appeals of the State of New York.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—November 22, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 760 and placed on the summary calendar and set for oral argument immediately following No. 419, Misc.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 760

MICHAEL VIGNERA,

Petitioner,

vs.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

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January 11, 1966.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR THE PETITIONER

Opinions Below

The memorandum decision of the Appellate Division of the Supreme Court, State of New York, Second Judicial Department, affirming petitioner's conviction, is reported at 21 App. Div. 2d 752, 252 N.Y.S.2d 19 (1964) (R. 33). The memorandum decision of affirmance of the New York Court of Appeals is reported at 15 N.Y.S.2d 970, 207 N.E.2d 527, 16 N.Y.2d 614, 209 N.E.2d 110 (1965) (R. 36-41).

Jurisdiction

The judgment of the New York Court of Appeals was entered April 15, 1965 (R. 36) and amended May 20, 1965 (R. 40). The petition for writ of certiorari was filed July 10, 1965, and was granted November 22, 1965. 86 Sup. Ct. 320. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented

1. Whether a confession, elicited from a suspect prior to arraignment by an assistant district attorney and recorded by a stenographer when the suspect has been detained by the police for approximately twelve hours, has become the focus of investigation, and has not been advised of his right to counsel or of his right to remain silent, is rendered constitutionally admissible against him in a state criminal trial by his failure to request counsel.

2. Whether the twenty-four hour detention of an uncautioned prospective defendant for the purpose of eliciting incriminating statements prior to arraignment is a violation of his constitutional rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments such as to render testimony as to the statements thus elicited inadmissible against him in a state criminal trial.

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in Appendix A, *infra*, pp. 45-47.

Statement

On August 30, 1961, petitioner was convicted of first degree robbery by the County Court, Kings County, following a three-day trial to a judge and a jury. On November 3, 1961, he was adjudged a third-felony offender and was sentenced to thirty to sixty years imprisonment pursuant to Section 1941 of the New York Penal Law (R. 3).

Thereafter, the United States District Court for the Western District of New York sustained a writ of habeas corpus filed by petitioner attacking the constitutional validity of a prior felony conviction, on the ground of deprivation of counsel. *Vignera* v. *Wilkins*, Civ. 9901 (W.D.N.Y. Dec. 31, 1961) (Henderson, D.J.). Pursuant to the order of the district court, petitioner was remanded for resentencing as a second-felony offender and, on February 6, 1963, was resentenced for the same term, thirty to sixty years imprisonment (R. 31-33).

The Appellate Division, Second Department, affirmed the judgment on resentence, without opinion, and dismissed as moot an appeal from the original judgment of November 3, 1961 (R. 34-35). By order dated May 25, 1964, as amended on June 22, 1964, the Appellate Division denied petitioner's motion for reargument and stated that the judgment rendered on resentence superseded the original judgment of November 3, 1961. Leave to appeal to the New York Court of Appeals was granted by certificate of Judge Stanley H. Fuld, dated June 23, 1964. On April 15, 1965, the Court of Appeals affirmed the judgment of the Appellate Division (R. 36-37). On May 20, 1965, the Court of Appeals ordered the remittitur amended to read as follows:

"Upon the appeal herein there were presented and necessarily passed upon questions under the United States Constitution, *viz.*:

"1. Whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;

"2. Whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted a denial of his rights under the Fourteenth Amendment of the United States Constitution.

"The Court of Appeals held that no rights of the defendant-appellant under the Fourteenth Amendment to the United States Constitution had been violated." 16 N.Y.2d 614, 209 N.E.2d 110 (1965) (R. 40-41).

Petitioner's motion for leave to proceed *in forma pauperis* was granted on November 22, 1965 (R. 41).

1. *The Crime.* The testimony at the trial established the following facts: At about 5:30 in the evening on Tuesday, October 11, 1960, a man entered the Chapeaux de Mode, a dress shop owned by the complaining witness, Harry Adelman, located at 4822 13th Avenue in the Borough of Brooklyn, New York City. With a knife in his hand, the man required Mr. Adelman to surrender cash contained in the register along with cash, travelers checks, and one or more credit cards in Mr. Adelman's pocket. Before departing

the dress shop, he forced Mr. Adelman, Mrs. Gertrude Adelman, and Mrs. Anita Waldinger, a saleslady, into the washroom (R. 6-10).

On Friday morning, October 14, 1960, Edward Nemeth was arrested at a store on Madison Avenue, Manhattan, while attempting to purchase jewelry with Harry Adelman's Diner's Club credit card (R. 28). Nemeth apparently told the police he had been given the credit card by petitioner and where petitioner lived (R. 27-28). The Diner's Club card was later introduced in evidence (R. 27).

2. *The Detention.* Shortly after Nemeth's arrest and the recovery of the Diner's Club card, petitioner was picked up by the police and taken to the 17th Detective Squad on East 49th Street in Manhattan (R. 24). Some time thereafter, he was taken from the 17th Detective Squad to the 66th Detective Squad where he was identified by Mr. Adelman and Mrs. Waldinger as the man who entered the Chapeaux de Mode on the evening of October 11 (R. 11-12, 24). It is not clear from the record at what time petitioner was brought to the 17th Detective Squad or at what subsequent time he arrived at the 66th Detective Squad. However, Mrs. Waldinger testified she saw him at the 66th Squad some time in the morning (R. 17).

At the trial, Police Detective John Gillen was asked on cross-examination where petitioner was first arrested:

> "A. He was taken into the 17th Squad and then he was brought to the 66th.
>
> "Q. Where is that?
>
> "A. East 49th Street, Manhattan. Then he was brought into the 66th Detective Squad where we questioned him and placed him under arrest." (R. 24.)

Detective Gillen testified he questioned petitioner—apparently after the identification by the complaining witness and the eyewitness (R. 22)—as to "whether he had committed the holdup at the place and he stated he had" (R. 23). Detective Gillen further testified that petitioner admitted he had obtained about ninety-three dollars and that he identified Mr. Adelman and Mrs. Waldinger as the persons he had robbed (R. 23-25).* By his questioning, Detective Gillen established that the escape from the scene of the crime had been made along 49th Street to the 49th Street elevated station and that a toy gun had been employed (R. 23).

At about 3:00 p.m. on the day of his apprehension, petitioner was formally arrested (R. 22). Still later that day, he was taken by other policemen to the 70th Precinct in Brooklyn "for detention" (R. 25). There, at approximately 11:05 p.m., he was visited by Assistant District Attorney Postal, who questioned him in the presence of Vito Lentini, a "hearing reporter" (R. 19-22, 30-31).** The questions

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* This account of the identification process, that is, the accused identifying the victim, avoided any hearsay problem. *Cf. Veney* v. *United States*, 344 F.2d 542 (D.C. Cir. 1965) (concurring opinion) (spontaneous apology).

** The ex parte deposition technique appears to be a common procedure of the New York District Attorneys rather than a distinguishing feature of this case:

> "Under normal procedure, an assistant district attorney, who is on homicide call in New York County 24 hours a day, is called to talk to a suspect only after the suspect has made a statement to the detectives in which he has admitted the crime.
>
> "Occasionally the detectives will call the assistant district attorney and say something like: 'He hasn't broken yet, and it's been two hours.'
>
> "Quite often the prosecutor will reply: 'Call me again in an hour. Keep working.' *(footnote continued on next page)*

covered virtually all the circumstances of the crime, expanding upon the questions put earlier by Detective Gillen (R. 30-31). Mr. Lentini, over objection, was permitted to read to the jury his notes of the questions posed by Mr. Postal and the answers given by petitioner; the transcript of those notes, Statement No. 2294, Folio No. 91 (R. 30-31), was apparently received in evidence (R. 20). The transcript purports to be a verbatim account of what was said by the parties, and recites the time of the commencement and close of the examination and the persons present. It includes no warning or caution of any kind (R. 30-31).

Some time the following day, Saturday, October 15, petitioner was taken to court for arraignment. In the patrol wagon "going to court" he was again questioned by Detective Gillen, who established that a knife rather than a toy gun had been used in the commission of the crime and that the knife had been thrown away (R. 23).

On cross-examination, immediately after Detective Gillen had testified that petitioner was brought to the 66th Squad to be questioned and placed under arrest, he was asked: "Did you advise him of his right to counsel?" That question was objected to by the prosecution, the objection was sustained by the trial court, and hence the question went unanswered (R. 24).

"Occasionally also—and this is at the discretion of the prosecutor on duty—he will proceed to where the suspect is being questioned before the suspect has made any admissions.

"This visit is to discuss the case with the detectives and possibly guide them to other facets of their inquiry. Normally, however, an assistant district attorney responds only when he is told a suspect has made a confession.

"At those times the prosecutors appear with stenographers, also attached to Mr. Hogan's office, to take down the confessions, which the District Attorney's officer prefers to call statements." N.Y. Times, Jan. 28, 1965, p. 1, col. 5, p. 17, col. 6.

Summary of Argument

I.

It is plain that the assistance of counsel guarantee of the Sixth Amendnment was violated in the present case when petitioner's deposition was taken by an assistant district attorney. At that point in time, some ten or twelve hours after petitioner had been apprehended, after he had been singled out by a confederate and linked to stolen property, after he had been identified by the victim and an eyewitness to the crime, after he had made incriminating statements to the police officers, and after he had been formally arrested, the criminal proceeding against him had begun. Indeed, it probably had begun several hours earlier, shortly before his initial questioning. At that point, petitioner had been implicated by a confederate, identified at the station house by the complaining witnesses, and presumably confronted with the stolen property already recovered. In any event, by the time of his recorded confession, taken by a member of the bar who came to the station house prepared, that is, accompanied by a stenographer, petitioner was still unadvised of his absolute right to silence and of his right to counsel. He remained ignorant of those rights throughout the interrogation by the assistant district attorney; he was just as ignorant the next morning in the patrol wagon when, under further questioning, he partially recanted and added an important element to the confession.

In view of *Escobedo* v. *Illinois,* 378 U.S. 478, the conviction must be reversed, notwithstanding petitioner had not retained counsel prior to his apprehension and failed to request counsel during his detention. The absence of a request to communicate with counsel does not distinguish

the present case from *Escobedo*, because the accusatory stage of the proceeding against petitioner had been reached by the time he fully confessed, if not long before. The situation here is actually more persuasive than Escobedo's, for there is every reason to believe that prior to his confession Escobedo was aware of both his right to silence and his right to counsel, and the police case against him was still slim.

II.

The conviction should be reversed on the independent ground that petitioner's recorded confession was obtained during a period of illegal detention. In light of *Malloy* v. *Hogan*, 378 U.S. 1, and *Griffin* v. *California*, 380 U.S. 609, petitioner's privilege against self-incrimination under the Fifth and Fourteenth Amendments was violated when his recorded confession and the testimony of the police officer were admitted at the trial stage of the proceeding. By the time of the confession to the assistant district attorney, and even more certainly by the next morning when a further admission was elicited by the detective, the continuance of police custody without judicial intervention had become unlawful. It amounted to a kangaroo imprisonment, authorized by no judge, statute, or constitution. In fact, it was expressly forbidden by New York's prompt arraignment statute, Section 165, Code of Criminal Procedure (Appendix A, *infra*, p. 46).

Because the federal courts have been readily able to prevent the use of confessions obtained during periods of illegal detention by means of their supervisory control over federal law enforcement agents and without resort to the Constitution, it does not follow that the privilege against self-incrimination is not impaired when police interrogation is permitted to go on unchecked. If interrogation during

protracted and illegal periods of detention cuts down on the privilege against self-incrimination, as it surely does, then the states can no longer avail themselves of the resulting confessions now that the privilege has been made obligatory upon them. Confessions obtained during periods of unlawful detention should be subjected to a scrutiny similar although not identical to that demanded by *McNabb* v. *United States*, 318 U.S. 332, and *Mallory* v. *United States*, 354 U.S. 449.

III.

It has frequently been recognized that the rights of privacy guaranteed by the Fourth and Fifth Amendments, and the right of counsel guaranteed by the Sixth Amendment, overlap albeit they do not coincide. Taken together, and especially in view of the federally-imposed exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643, it is possible to derive a single principle that protects all of those rights in the context of police interrogation and yet permits legitimate investigation of crime. That principle would require the exclusion of all confessions obtained in police custody after the accusatory stage has been reached, absent an effective and unequivocal waiver of the accused's right to silence and right to counsel. Notwithstanding such a waiver, if the interrogation were to continue beyond a reasonable time that would allow for routine administrative procedures such as fingerprinting and booking the putative defendant, then the confession would still have to be excluded on the ground that the prior waiver would be presumed ineffective and not to have countenanced an illegal detention for the purpose of eliciting incriminating statements.

Argument

Once again the Court is called upon to review what has unfortunately become an American "folk ritual," the extraction of confessions by the police, *in camera* and in the absence of counsel for the accused. See Sutherland, *Crime and Confession,* 79 Harv. L. Rev. 21, 23 (1965). The unhappy task of intruding upon the enforcement of state criminal justice is made necessary because New York and a number of other states have refused to recognize, or have only grudgingly recognized, that the right to counsel and the right to silence are present in the police station—that due process forbids local police from subverting or undermining those rights. A number of the Court's decisions have made clear that those rights come into being before the commencement of the criminal trial and that they are fundamental to our system of procedural liberty, precisely in the sense of *Palko* v. *Connecticut,* 302 U.S. 319.

Predictably, a great outcry has been heard throughout the land since the end of the 1963 Term when the Court held that the pre-trial right to counsel attached during police detention once the criminal proceeding for all practical purposes had begun. *Escobedo* v. *Illinois,* 378 U.S. 478. Predictably, too, drastic extensions of *Escobedo* have been forecast both by the detractors and the supporters of that decision. Petitioner submits, however, that the present case does not require an enlargement of *Escobedo.* It does provide the Court with an opportunity to elaborate its constitutional rule in the context of a more typical factual pattern so that the rule's application to law enforcement agents around the country may become reasonably clear. Petitioner further submits that, as elaborated,

the rule will neither require the police to appoint counsel nor put an end to all police questioning. It will, on the other hand, make no distinction between the rich and the poor, the ignorant and the sophisticated, the professional criminal and the innocent accused.

I.

The Conviction Was Obtained in Violation of Petitioner's Right to Counsel Guaranteed by the Sixth Amendment.

In 1963 the Court in *Gideon* v. *Wainwright*, 372 U.S. 335, held that the Sixth Amendment's guarantee of counsel is among those rights deemed so fundamental as to be made obligatory on the states by the Fourteenth Amendment, even in non-capital cases. Thereafter, in *Massiah* v. *United States*, 377 U.S. 201, the right to counsel was found infringed when agents of the Government overheard statements by the defendant before his appearance in any courtroom but after indictment and retention of counsel. Later in the 1963 Term, the Court in *Escobedo* v. *Illinois*, 378 U.S. 478, recognized the right to counsel during police detention because, on the facts of that case, the criminal prosecution had already begun notwithstanding it was short of any "defined legal stages." See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 947 n.96 (1965). Finally, last Term, the Court in *McLeod* v. *Ohio*, 381 U.S. 356, applied the rule to a post-indictment interrogation where counsel had been neither retained nor requested.

Gideon, *Massiah*, and *Escobedo* represented an extension of *Powell* v. *Alabama*, 287 U.S. 45, 69, which had held that a defendant, at least in a capital case, was

constitutionally entitled to "the guiding hand of counsel at every step in the proceedings against him." In *Hamilton* v. *Alabama*, 368 U.S. 52, and *White* v. *Maryland*, 373 U.S. 59, "every step" was construed to include the steps of arraignment and preliminary hearing, whenever the proceedings were such that important legal consequences could follow from the absence of defense counsel.

It is in the context of the several decisions discussed above that the present case must be viewed. *Escobedo*, of course, has more immediate impact because that case, as this one, involved the informal, non-public stage of the criminal prosecution.

First: The undisputed facts here are well within the bounds of those circumstances that were found to make the confession inadmissible in *Escobedo*:

1. The investigation was no longer a general inquiry into an unsolved crime, but had focused upon a particular suspect. The prosecution's case in chief established beyond cavil that, by three o'clock on the afternoon of the day on which petitioner was formally arrested, the crime for which he was later tried and convicted had been solved to the satisfaction of the police. Although the trial testimony is somewhat disjointed and incomplete, it is obvious that the arrest of Edward Nemeth had led directly to petitioner and connected him with the recovered stolen property. Petitioner had been apprehended and later identified by two witnesses to the crime. Surely, at that point, the investigation had begun to focus on him and the purpose of further detention and interrogation was to elicit incriminating statements. Thus, under police questioning, petitioner did incriminate himself by admitting he had robbed the dress

shop. Respondent conceded in the court below, "we do not dispute that by this time [3:00 p.m.] the defendant was in the eyes of the police and the authorities a prospective defendant, and that the police had every intention of arraigning him, as they did, the next morning." Brief for Plaintiffs-Respondents, p. 18. But petitioner was not then arraigned; instead he was transported to another precinct "for detention" (R. 25), despite the statutory requirement that he be arraigned "without unnecessary delay," N.Y. Code Crim. Pro. § 165 (Appendix A, *infra*, p. 46). When Assistant District Attorney Postal arrived at the station house with the stenographer at eleven that night, he came with a single purpose—to conduct an examination before trial. The process of investigation had come to an end; the process of convicting petitioner was well under way.

2. Petitioner was in custody. In fact, by the time of his formal arrest, several hours had already elapsed from the moment of his apprehension, his *de facto* arrest. The *de jure* arrest only served to underscore the critical nature of the proceeding as of 3:00 p.m. Nonetheless, another eight hours of in-custody restraint were to go by before petitioner's detailed confession was recorded and, after that, many more hours before his final admission in the patrol wagon the following day.

3. The sole purpose of the deposition taken by the assistant district attorney was "to elicit a confession," "to 'get him' to confess his guilt despite his constitutional right not to do so." *Escobedo* v. *Illinois*, 378 U.S. at 485, 492. It is clear that the object of the near-midnight examination was to wrap up the prosecution's case, to have a skilled attorney supervise the generation of an irrefutable record,

in question and answer form for subsequent use at trial, and thus to do "precisely what the demands of our legal order forbid: make the suspect the unwilling collaborator in establishing his guilt." *Culombe* v. *Connecticut*, 367 U.S. 568, 575. The assistant district attorney came to the station house armed with a stenographer and seeking to develop the record for a more facile conviction. He and the stenographer, Mr. Lentini, were experienced hands in the art of ex parte discovery, having appeared, a few months earlier, at a hospital bedside at 3:55 a.m. to extract the confession of a suspect who had been shot. See *Jackson* v. *Denno*, 378 U.S. 368, 371, 423 n.1. See also *United States ex rel. Weinstein* v. *Fay*, 333 F.2d 815 (2d Cir. 1964), where Mr. Postal performed a similar function in the preceding year. Apart from the reported decisions following trial and appeal, one can only assume that Mr. Postal conducted similar discovery proceedings on hundreds of occasions where clearance was later achieved by guilty plea.*

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* The experience acquired by the assistant district attorney in conducting ex parte discovery proceedings at the police station is further evidence that the assistance of defense counsel in the present case was indispensable. It also raises serious questions under Canon 9 of the American Bar Association Canons of Professional Ethics, pointedly noted by the Court in *Escobedo* v. *Illinois*, 378 U.S. at 487 n.7. A society that not only permits but indeed encourages the systematic violation of professional ethics by its public officials is seriously flawed. Its ambivalence toward law enforcement is perhaps demonstrated by the attempt last year of the Committee on the Bill of Rights of the Association of the Bar of the City of New York to obtain an opinion from the Committee on Professional Ethics as to the propriety of station house discovery. See 20 Record of N.Y.C.B.A. 477 (1965). To date such an opinion has not been published. By contrast, the Executive Committee found no difficulty in sharply criticizing a prosecutor for lack of zeal in advancing a particular cause. See 154 N.Y.L.J. No. 117, p. 1 (Dec. 20, 1965).

4. At no time was petitioner warned of his right to counsel or of his right to remain silent. While the question by defense counsel at trial indicated the police had not advised petitioner of his right to counsel, it was frustrated by the prosecution's objection which the trial court sustained (R. 24). In the court below, however, respondent did not suggest that a warning was in fact given, but instead argued strenuously that none was required under New York law. Brief for Plaintiffs-Respondents, pp. 18-26. More important, Mr. Lentini's transcript of the confession, which reads as a verbatim account of what was said, who was present, and the time of commencement and termination of the examination, contains no caution of any sort (R. 30-31).

Second: It is apparent the accusatory stage of the proceeding against petitioner had been reached when he was examined by the assistant district attorney, arguably when he was earlier questioned by the police. The case in many respects is actually stronger for petitioner than that in *Escobedo*, because here the police had already acquired more usable evidence, *cf. United States ex rel. Russo* v. *New Jersey*, 351 F.2d 429, 437 (3d Cir. 1965), and because the recorded confession and the later admission in the patrol wagon were obtained during a period of prolonged detention. Indeed, respondent effectively concedes by the statement quoted above that the critical, accusatory stage had been reached long before the taking of the recorded confession. As a result, the only ground for distinguishing the present case from *Escobedo* is the fact that petitioner had not retained counsel prior to or at the time of his apprehension and thereafter did not ask to communicate with counsel. That adventitious distinction has been seized upon by the

New York Court of Appeals in *People* v. *Gunner*, 15 N.Y.2d 226, 205 N.E.2d 852 (1965), and by a number of other state as well as federal courts.*

The courts that have so limited application of *Escobedo* have acted by simple *ipse dixit*. Their opinions have not developed a rationale for the distinction nor have they attempted to rebut criticism of it. It is remarkable that the New York Court of Appeals would take this tack in light of its significant right to counsel decisions such as *People* v. *Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103 (1962), and *People* v. *DiBiasi*, 7 N.Y.2d 544, 166 N.E.2d 825 (1960), cited with approval in *Massiah* v. *United States*, 377 U.S. 201, 205. And in *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), the Court of Appeals invoked the right to counsel during a detention before arraignment where there had been an attempt by previously retained counsel to consult with his client. Perhaps it is significant that the author of the *Donovan* opinion, along with the chief judge, did not join with the majority in that part of the *Gunner* decision refusing to recognize the right to counsel where there has

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* *United States ex rel. Townsend* v. *Ogilvie*, 334 F.2d 837 (7th Cir. 1964), *cert. denied*, 379 U.S. 984; *Mitchell* v. *Stephens*, 232 F. Supp. 497 (E.D. Ark. 1964); *State* v. *Miranda*, 98 Ariz. 18, 401 P.2d 721 (1965), *cert. granted*, 86 Sup. Ct. 320; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A.2d 288 (1965); *State* v. *Worley*, 178 Neb. 232, 132 N.W.2d 764 (1965); *Bean* v. *State*, 398 P.2d 251 (Nev. 1965); *People* v. *Hartgraves*, 31 Ill.2d 375, 202 N.E.2d 33 (1964), *cert. denied*, 380 U.S. 961; *Anderson* v. *State*, 237 Md. 45, 205 A.2d 281 (1964); *State* v. *Smith*, 43 N.J. 67, 202 A.2d 669 (1964), *cert. denied*, 379 U.S. 1005; *Wansley* v. *Commonwealth*, 205 Va. 412, 137 S.E.2d 865 (1964), *cert. denied*, 380 U.S. 922; *Browne* v. *State*, 24 Wis.2d 491, 131 N.W.2d 169 (1964), *cert. denied*, 379 U.S. 1004; *State* v. *Kitashiro*, 48 Hawaii 204, 397 P.2d 558 (1964) (dictum); *State* v. *Fox*, 131 N.W.2d 684 (Iowa 1964); see also *State* v. *McLeod*, 1 Ohio St.2d 60, 203 N.E.2d 349 (1964), *rev'd per curiam*, 381 U.S. 356.

been no attempt at communication between the accused and his lawyer:

> "The court finds this argument [requiring a warning] without merit; the majority is of the opinion that the rule heretofore announced in our decisions (see, e.g., *People* v. *Failla*, 14 N.Y.2d 178, *supra*; *People* v. *Donovan*, 13 N.Y.2d 148, *supra*; *People* v. *Meyer*, 11 N.Y.2d 162; *People* v. *Noble*, 9 N.Y.2d 571; *People* v. *Waterman*, 9 N.Y.2d 561; *People* v. *DiBiasi*, 7 N.Y.2d 544) should not be extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused. . . . The Chief Judge and I take a different view and would exclude the additional statements which the defendant made after his arrest but before his lawyer communicated with the police. . . ." 15 N.Y.2d at 233 (Fuld, J.).

In contrast, the courts that have applied *Escobedo* to the present situation have done so by exegetic opinions. For example, in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361, 368 (1965), the Supreme Court of California pointed out that the refusal to honor the request to communicate with counsel was important in *Escobedo* not as a prerequisite to accrual of the right but as evidence that the investigation had then shifted from the general to the focused. See Note, 53 Calif. L. Rev. 337, 361 (1965).* Escobedo's

* Accord, *United States ex rel. Russo* v. *New Jersey*, 351 F.2d 429, 436 (3d Cir. 1965); *Collins* v. *Beto*, 348 F.2d 823 (5th Cir.

request merely indicated he was more aware of his rights than is the vast majority of arrestees. The request made clear in the record what was already obvious to the police after Escobedo had been confronted with the accusation of an apparent confederate: the parties had become adversaries and the need for counsel was critical. 378 U.S. at 485.

It would be an extraordinary step backward to hold that the right to counsel does not come into existence, or is not violated, although the accusatory stage has been entered, because the uncautioned and uncounseled accused has neglected to request a lawyer. The unknowing putative defendant is the very person most in need of counsel. Escobedo was apparently aware of his right to remain silent, but the uncautioned arrestee who has not previously retained counsel will rarely be so aware. See Statement of Counsel for Respondent, N.Y. Times, Nov. 22, 1965, p. 39, col. 1. It is he who most needs counsel to advise him of his absolute right to silence. See *Escobedo* v. *Illinois*, 378 U.S. at 488. Furthermore, in *Escobedo* there was at least an opportunity for a waiver. While Escobedo, conscious of his rights, might have elected to waive them, in the present case that opportunity never arose. An accused can hardly waive rights that are unknown to him and, indeed, that would probably surprise him. See *Note*, 31 U. Chi. L. Rev. 591, 601 (1964).

The *Gunner* decision lends no rational support to a niggardly reading of *Escobedo* or the several other right to

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1965) (dictum); *Wright* v. *Dickson*, 336 F.2d 878 (9th Cir. 1964); *Galarza Cruz* v. *Delgado*, 233 F. Supp. 944 (D.P.R. 1964); *State* v. *Dufour*, 206 A.2d 82 (R.I. 1965); *State* v. *Neely*, 239 Ore. 487, 398 P.2d 482 (1965); *Commonwealth* v. *Negri*, 213 A.2d 670 (Pa. 1965) (dictum); *State* v. *Hall*, 397 P.2d 261, 268 (Idaho 1964) (concurring opinion); *Commonwealth* v. *McCarthy*, 200 N.E.2d 264 (Mass. 1964); *Campbell* v. *State*, 384 S.W.2d 4 (Tenn. 1964).

counsel decisions of this Court. It is oblivious to the nub of the opinion in *Escobedo* (at 490), where the admonition to law enforcement agents and inferior courts could not have escaped attention:

> "We have also learned the companion lesson of history that no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise these rights. . . ."

Apart from the language of *Escobedo*, prior decisions of the Court have made it abundantly clear that the right to counsel does not depend on a request, *Carnley* v. *Cochran*, 369 U.S. 506, 513, *McLeod* v. *Ohio*, 381 U.S. 356, and that a waiver of constitutional dimension is not to be presumed but requires "an intentional relinquishment or abandonment of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464.

Reliance upon failure to request a lawyer would, in addition, raise grave doubts under the equal protection clause of the Fourteenth Amendment. To provide special protection from interrogation for those who can afford counsel or who are sophisticated in the way of the station house while leaving those less able to fend for themselves with the police and the district attorney would be too incongruous to tolerate in a civilized society. See *Douglas* v. *California*, 372 U.S. 352; *Griffin* v. *Illinois*, 351 U.S. 12. The Supreme Court of California said much the same thing in *People* v. *Dorado*, 42 Cal. Rptr. 169, 398 P.2d 361, 369-70, *cert. denied*, 381 U.S. 937:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it."

The *Gunner* decision has been specifically criticized by commentators in New York, for example, Note, *Escobedo in New York*, 40 St. John's L. Rev. 51, 54-59 (1965), as has its progeny in other jurisdictions, for example, Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, CRIMINAL JUSTICE IN OUR TIME 57 (1965). Even the commentators who are distressed by *Escobedo* point out that it would be irrational to limit its scope on the basis of failure to request counsel, for example, Enker & Elsen, *Counsel for the Suspect: Massiah* v. *United States and Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47, 77 (1964). Similarly, Mr. Justice White's dissenting opinion notes that the decision cannot be limited to cases where the accused has retained his own counsel or asked to consult with counsel during the course of interrogation. 378 U.S. at 495.*

* One of the peculiarities of the *Gunner* limitation is demonstrated in *People* v. *Taylor*, 22 App. Div. 2d 524, 256 N.Y.S.2d 944 (1st Dep't 1965), where *Escobedo* was applied to a police detention during which the accused asked to communicate with his family. While the decision was rightly decided, especially in light of *Haynes* v. *Washington*, 373 U.S. 503, it is ironic that, under

Third: In sanctioning a conviction "assured by pretrial examination," 378 U.S. at 487, the decision below undermines the right to counsel at trial, *Gideon* v. *Wainwright*, 372 U.S. 335, as well as the privilege against self-incrimination, *Malloy* v. *Hogan*, 378 U.S. 1. Professor Kamisar's analogy in the context of the present situation is apt. If the prosecution's case can be completed in the police station because the accused is too poor to have retained counsel or too ignorant to ask for it, then we permit the grandly proclaimed right to counsel in the judicial mansion to be utterly subverted by what we ignore in the police gatehouse. Kamisar, *supra* at 93. The ultimate trial in the mansion thus becomes " 'a very hollow thing,' " little more than "an appeal from the interrogation." 378 U.S. at 487.

The controversy now abroad in the United States is not really concerned with the significance of retained counsel or a request for counsel but instead with the validity of the *Escobedo* decision itself. It is apparent that many fervently hope the Court will withdraw from the area of police detention (at least where the confessions are ostensibly voluntary) and sharply curtail the *Escobedo* rationale. In light of the many right to counsel decisions discussed above,

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such a rule, one who knows enough to make some attempt to communicate with the outside world is immeasurably better off than one who is not endowed with even that degree of sophistication. It is also noteworthy that in *People* v. *Donovan*, 13 N.Y.2d 148, 193 N.E.2d 628 (1963), the court was persuaded by the lawyer's unsuccessful attempt to communicate with his client in custody. See also *People* v. *Friedlander*, 16 N.Y.2d 248, 250-51 (1965). The right under discussion, after all, is the right of the accused, the one who faces ultimate trial and conviction, not the right of a lawyer to assist his client or of a father to rescue his son. See Kamisar, *supra* at 90. *Cf. People* v. *Hocking*, 15 N.Y.2d 973, 207 N.E.2d 529 (1965).

the matrix for *Escobedo* as it were, it would seem unwise if not impossible for the Court to do so. In any event, the reasons advanced by the critics are unsound.

It is hardly surprising that the criticism in large part has emanated from spokesmen for law enforcement agencies, for example, Los Angeles Police Chief Parker. See 40 Los Angeles Bar Bulletin 603 (1965).* But a majority of the United States Court of Appeals for the Second Circuit is equally concerned. It believes that the problem of detention for interrogation must be treated in a legislative, experiential manner, as in a model code of pre-arraignment procedure such as that now being drafted under the auspices of the American Law Institute. See *United States* v. *Drummond*, No. 28710 (2d Cir. Dec. 2, 1965); *United States* v. *Cone*, No. 29345 (2d Cir. Nov. 22, 1965); *United States* v. *Robinson*, No. 28883 (2d Cir. Nov. 22, 1965); Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929 (1965). See also *United States* v. *Del Llano*, No. 29570 (2d Cir. Dec. 22, 1965).

Much of the concern has been caused by *Escobedo* and a number of its antecedents save *Gideon*. The prospect of street-corner caution, automatic assignment of counsel, and the inability of the police to rescue kidnap victims and stolen property are bemoaned. 53 Calif. L. Rev. at 940-51. But *Escobedo* does not eliminate street-corner questioning nor the spontaneous confession following hard upon arrest, nor does it require the police to assign counsel. Indeed, the location of the kidnap victim was properly elicited by

* Some law enforcement officials, on the other hand, have hailed the Court's recent decisions, for example, Los Angeles District Attorney Younger. See Los Angeles Times, Oct. 2, 1965, p. 1. Similarly, counsel for respondent in the present case has announced that suspects upon arrest will be advised of their right to counsel. See N. Y. Times, Nov. 22, 1965, p. 39, col. 1.

the police before any warning in *People* v. *Modesto*, 42 Cal. Rptr. 417, 398 P.2d 753 (1965), cited by Judge Friendly in his concurring opinion in *Drummond, supra* at 3464, where the statement came during the defendant's initial confrontation with the police at his home. (Subsequent, and unnecessary, confessions made by the uncautioned defendant at the station house were improperly admitted, resulting in the second reversal of a conviction for an unusually heinous crime. 398 P.2d at 759.)

If the police officers are unable to find the kidnap victim, locate the stolen property, or protect the security of the nation (threatened in *Drummond*), and if they believe their investigation will be substantially impaired by advising the suspect of his constitutional rights once the accusatory stage has been reached, they can always elect to continue without a warning. The public safety will thus be protected while the fruits of the continued investigation will merely be unavailable to the prosecution at the trial of the particular suspect whose rights had been contravened. See *The Supreme Court, 1963 Term*, 78 Harv. L. Rev. 143, 223 (1964).

The majority opinions in *Drummond, Cone,* and *Robinson* reiterate the argument of investigative necessity. Again, their anxiety appears to be largely illusory. In *Drummond*, the accused was repeatedly cautioned by the F.B.I. agents. *Cf. Otney* v. *United States*, 340 F.2d 696 (10th Cir. 1965); *Jackson* v. *United States*, 337 F.2d 136 (D.C. Cir. 1964). In *Cone*, the admissions were made shortly after initial apprehension and before reaching F.B.I. headquarters. In *Robinson*, while the admissions were made in the local station house, it is at least arguable (as it is not in the present case) that the accusatory stage

had yet to be reached at the time they were obtained. Nevertheless, the majority opinions in those three cases seem impelled to advocate unencumbered authority for law enforcement agents, at least during an initial period of some hours and where the resulting confession appears to be voluntary in the sense of fundamental fairness and the totality of circumstances. See *United States* v. *Cone, supra* at 3400. *Cf. People* v. *Price,* 63 A.C. 388, 396-97 (Cal. 1965). They apparently overlooked *Massiah,* where the admissions were obtained in a context devoid of coercion. *Cf. Griffin* v. *California,* 380 U.S. 609, 619 (dissenting opinion); *Pointer* v. *Texas,* 380 U.S. 400, 413 (concurring opinion).

These recent Second Circuit majority and concurring opinions, along with Judge Friendly's article, all reflect a degree of impatience with certain of the Court's constitutional imperatives that appear to affect criminal investigation. The difficulty, however, with their legislative solution stems from what we all know only too well, "that it is a *constitution* we are expounding," *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, quoted in Friendly, *supra* at 954 n.132, and *Mr. Justice Frankfurter,* 51 Va. L. Rev. 552, 554 (1965).

Nor can the basic guarantees of counsel and freedom from testimonial compulsion be left to the states for laboratory experiment. See *Pointer* v. *Texas,* 380 U.S. 400, 413 (concurring opinion). Even if they could, the state experiments to date have proved conspicuously unsuccessful. For eighty-five years, to cite a New York example, it has been a misdemeanor under Penal Law § 1844 for a public officer wilfully and wrongfully to delay taking a person under arrest before a magistrate, and yet not a single prosecution has been reported under that statute. Most of the states have prompt arraignment statutes, collected in La Fave,

Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331, 332-33; half, including Illinois, have statutes that forbid police interference with an accused's attempt to consult with his lawyer, collected in Comment, 1962 U. Ill. L.F. 641, 646. The volume of confession cases in recent years attests to the failure, if not disingenuousness, of these various state statutes.

The American Law Institute will be most helpful, of course, by drafting a code to moderate police practices and criminal investigation in general. Such a code might make great strides in regulating and confining troublesome police methods, investigative arrests, wire-tapping, and the like. It would thereby allay the disquiet of those who believe that, if particular police conduct offends the spirit of the Constitution, it is not enough to exclude the resulting evidence at the trial of the person whose rights had been violated. See Friendly, *supra* at 949.

But all this Court has ever done in the state criminal cases that come before it has been to formulate constitutionally required rules of trial procedure—precisely the point made in the concluding sentence of the *Massiah* opinion. 377 U.S. at 207. The Court has no power to compel the police to abide by state or federal statutory proscriptions, or even the implicit commands of the Constitution. See *Pugach* v. *Dollinger*, 365 U.S. 458; *Schwartz* v. *Texas*, 344 U.S. 199. If an act of police lawlessness impinges upon rights protected by the Fourteenth Amendment, the Court can only see to it that the evidence obtained is rendered inadmissible at the trial of the party aggrieved. On the other hand, no legislature can adopt a code that curtails the Bill of Rights. Until now it has been the ultimate duty of this Court to interpret and apply the Constitution, and

until now there has been little doubt that the Constitution is present in the police station.

II.

The Conviction Was Obtained in Violation of Petitioner's Privilege Against Self-Incrimination Guaranteed by the Fifth Amendment.

Police invasion of privacy is disruptive of our system of procedural liberty, especially when carried out purposefully with an intent to elicit self-incriminating evidence. The decision below tacitly approves a serious incursion into petitioner's right of privacy under the Fourth, Fifth, and Fourteenth Amendments, as recognized by recent decisions of the Court in *Griffin* v. *California*, 380 U.S. 609; *Malloy* v. *Hogan*, 378 U.S. 1; *Ker* v. *California*, 374 U.S. 23; *Wong Sun* v. *United States*, 371 U.S. 471; *Mapp* v. *Ohio*, 367 U.S. 643; *cf. Griswold* v. *Connecticut*, 381 U.S. 479.

The Court has hitherto been reluctant to apply the federal exclusionary rule, derived from *McNabb* v. *United States*, 318 U.S. 332, as reaffirmed by *Mallory* v. *United States*, 354 U.S. 449, to state convictions. That reluctance has been attributable to the distinction between the supervisory power of the Court over federal agents and its constitutional power to review state convictions obtained in violation of the Fourteenth Amendment. In addition, it may be supposed that the Court is loath to impose upon the states a sometimes technical rule that may be inadvertently violated by law enforcement agents who delay arraignment for a comparatively short time. This does not mean that because *McNabb-Mallory* is a judge-made rule, enforced with rigor of a statute, there are no constitutional ramifica-

tions to an illegal detention. *McNabb* never reached the constitutional questions there raised because the Court was able to reach decision solely on the basis of its supervisory power. After *McNabb* and until *Mapp*, there was no need to consider further those questions because Rule 5(a) of the Federal Rules of Criminal Procedure codified the exclusionary rule for the federal courts, while at the same time the doctrine of *Wolf* v. *Colorado*, 338 U.S. 25, precluded its application to state convictions.

The significance of *Mapp* lies in the remedy it provides under the Fourth Amendment. For the first time in the history of our federal system we have a constitutionally-required exclusionary rule imposed upon the states and applicable to relevant and reliable evidence. Previously, federal supervision of state convictions was restricted to reviewing trials that were inherently incompatible with the due process clause because they were predicated on coerced confessions or other unfairness at the trial. Use of a coerced confession was thought to be so abominable as to reduce the trial itself to something less than that fair hearing required by an ordered system of liberty. See *Lisenba* v. *California*, 314 U.S. 219, 236. But in the cases involving attempts to exclude illegally obtained evidence, the antecedent violation of the defendant's rights was distinguished from the introduction of reliable evidence secured by means of that violation. This was the rationale of *Wolf* and its sequelae.

With the advent of *Mapp*, however, we now have a true exclusionary rule that frankly operates as a chastisement of the police irrespective of whether the trial is unfair in the ~~custody~~ custodial sense. And, more recently, it has been recognized that the exclusionary rule protects "against the overhearing of verbal statements as well as against the more

traditional seizing of 'papers and effects'." *Wong Sun* v. *United States*, 371 U.S. 471, 485, made applicable to the states by *Traub* v. *Connecticut*, 374 U.S. 493. A constitutional rule of exclusion is equally appropriate in the case of illegal detention, at least where it is clear that the objective of the detaining officers is to use the arrestee as the primary device for preparing the prosecution's case. *Cf. Culombe* v. *Connecticut*, 367 U.S. 568, 632.

First. Petitioner was detained by the police for a period of approximately twenty-four hours before being arraigned by a magistrate and without ever being advised of his right to remain silent (R. 17, 23, 30-31). See *People* v. *Kelly*, 264 App. Div. 14, 16, 35 N.Y.S.2d 55 (3rd Dep't 1942) (twenty-four hour detention illegal as a matter of law). During that time he was interrogated first by the police, then by an assistant district attorney, and finally by the police again—"in the patrol wagon the next day going to court" (R. 23). Testimony as to incriminating statements extracted during each of those interrogations was admitted at trial (R. 23, 20-21, 30-31). Further, petitioner was detained without arraignment for at least eighteen hours after he had been formally charged by the police at 3:00 p.m. and had admittedly become a "prospective defendant." See Brief for Plaintiffs-Respondents, New York Court of Appeals, p. 18. At the time petitioner was arrested *de jure*, a magistrate was available for arraignment. See Rule 3, New York City Criminal Court Act, which provides (as did Section 101 of the predecessor Act then in effect) that the Criminal (formerly Magistrate's) Court shall be open daily from 9:00 a.m. until 4:00 p.m.

New York law provides that, upon arrest, "the defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of

the day or night." Upon arraignment "the magistrate must immediately inform him of the charge against him and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had." The magistrate "must allow the defendant a reasonable time to send for counsel." Sections 165, 188, 189 of the New York Code of Criminal Procedure (Appendix A, *infra*, pp. 46-47).

Thirty-four years ago, the New York Court of Appeals declared:

> "The police are guilty of oppression and neglect of duty when they wilfully detain a prisoner without arraigning him before a magistrate within a reasonable time. (Code Crim. Pro. § 165.) The conclusion is inescapable that they do this for the purpose of subjecting him to an inquisition impossible thereafter. . . ." *People* v. *Mummiani*, 258 N.Y. 394, 399-400, 180 N.E. 94 (1932).

The court in *Mummiani* went on to state that an officer who unreasonably delays arraignment should be prosecuted by the district attorney and that "a district attorney who wilfully neglects to initiate such a prosecution after knowledge of the offense may be guilty of a crime himself." 258 N.Y. at 400. Notwithstanding the frustration of that pious hope, the New York Court of Appeals has not found it necessary to supply an effective remedy for the violation of rights held out by state law. Absent coercion or, in recent years, a demand for or by counsel, a confession elicited "during a period of illegal detention following an unlawful arrest," is admissible in evidence at trial in New York. *People* v. *Everett*, 10 N.Y.2d 500, 507, 180 N.E.2d 556, 559 (1962), *cert. denied*, 370 U.S. 963 (decided prior to *Wong Sun*).

Indeed, having ruled that confessions obtained in the absence of counsel after but not before arraignment are inadmissible, *People* v. *Meyer*, 11 N.Y.2d 162, 182 N.E.2d 103 (1962), *People* v. *Rodriguez*, 11 N.Y.2d 279, 183 N.E.2d 651 (1962), the present New York rule not only sanctions delays in arraignment but affirmatively encourages them as the last opportunity to secure a usable confession.

Thus, the decision below tacitly approves the use at trial of a confession extracted from a presumptively innocent accused arrested on probable cause but further detained without authority of statute, without judicial supervision of any sort, without opportunity to consult with counsel or friends, without being told of the charges against him or the rights guaranteed him, and, short of coercion, without limit. It cannot reasonably be suggested today that such a procedure does not fall below the minimal standards implicit in the concept of ordered liberty. Quite clearly it collides with the privilege against self-incrimination as well as several other rights explicitly guaranteed by the Constitution.

Second. The privacy concept underlies both the Fourth and Fifth Amendments and was the root force on which the framers drew when attempting to curtail the power of government in the area of arbitrary arrest, unreasonable search and seizure, compulsory self-incrimination, and Star Chamber inquisition. See *Mapp* v. *Ohio*, 367 U.S. at 656-57. Illegal detention based on an unreasonable delay in arraignment, with all the trappings of police dominion over the arrestee and the awesome atmosphere of the station house, represents invasion of privacy in its most unattractive form. Police seizure of the person and the interrogator's search through the arrestee's mind are at least as pernicious as

the breaking of doors and the "rummaging of drawers." See *Boyd* v. *United States*, 116 U.S. 616, 630, quoted in *Mapp* at 646. Moreover, an illegal detention against the arrestee's will amounts to deprivation of his personal liberty of movement and association guaranteed by the due process clause itself. See *Culombe* v. *Connecticut*, 367 U.S. 568, 573.

The Fifth Amendment privilege against self-incrimination, only recently held applicable to the states under the Fourteenth Amendment, *Malloy* v. *Hogan*, 378 U.S. 1, adds both breadth and particularity to the Fourth Amendment right of personal security. The privilege against self-incrimination goes beyond the long-standing prohibition of coerced confessions and is the "essential mainstay" of our accusatorial system. 378 U.S. at 7. When the petitioner here became the accused he became entitled to rely on that mainstay. While this is not a case of confessions coerced "by fear of hurt, torture or exhaustion," *Adamson* v. *California*, 332 U.S. 46, 54, it is also not a case of a "free choice to admit, to deny, or to refuse to answer." *Lisenba* v. *California*, 314 U.S. 219, 241, quoted in *Malloy*, 378 U.S. at 7. A choice containing concealed alternatives, after all, is no choice at all. See HOLMES, THE COMMON LAW 94 (1881). The alternative of silence was carefully, designedly, and protractedly concealed from petitioner.

The New York courts have recognized that to admit voluntary confessions obtained after arraignment or indictment in the absence of counsel would violate the privilege against self-incrimination, *e.g.*, *People* v. *Waterman*, 9 N.Y.2d 561, 175 N.E.2d 445 (1961). *Cf. People* v. *Robinson*, 13 N.Y.2d 296, 196 N.E.2d 261 (1963) (privilege violated by interrogation following sham arraignment). That deter-

mination has been bottomed on the proposition that arraignment or indictment "marks the *formal* commencement of the criminal action." 9 N.Y.2d at 565 (emphasis added). But it is perfectly clear that the accrual of a constitutional right cannot depend upon such a formal, nonfunctional test —especially where the police can delay the "formal commencement" at will. See *Escobedo* v. *Illinois*, 378 U.S. at 486, 487 n.6. Yet the decision below authorizes a procedure whereby petitioner, having been deprived of his liberty without any process of law and long after the authority of the original arrest had been exhausted, was obliged to participate in a program of interrogation designed to obtain his assistance in creating the record that would be used to convict him at trial. Surely the Fifth Amendment privilege is subverted by such a detention.

Since the decisions of the Court in *McNabb* v. *United States*, 318 U.S. 332, and *Mallory* v. *United States*, 354 U.S. 449, each of the policy considerations there seen as requiring an exclusionary rule have been recognized to be of constitutional status. Those policies are (a) the necessity of interposing the impartial judgment of a judicial officer between the citizen and the police, 354 U.S. at 452, *cf. Wong Sun* v. *United States*, 371 U.S. at 481-82, *Aguilar* v. *Texas*, 378 U.S. 108, 111; (b) the necessity of averting opportunities for "third degree" interrogation, 354 U.S. at 453, *cf. Gallegos* v. *Colorado*, 370 U.S. 49; (c) the necessity of forestalling "a process of inquiry that lends itself . . . to eliciting damaging statements" to support arrest and guilt, 354 U.S. at 454, *cf. Escobedo* v. *Illinois*, 378 U.S. at 492; (d) the necessity of affording the suspect advice as to his right to counsel and to silence before "any judicial caution [has] lost its purpose", 354 U.S. at 455, *cf. Escobedo* v. *Illinois*, 378 U.S. at 486-88. Those policies, having been

recognized to be both constitutionally required and enforceable against the states, should therefore be "enforceable against them by the same sanction of exclusion as is used against the Federal Government." *Mapp* v. *Ohio*, 367 U.S. at 655. See *Wong Sun* v. *United States*, 371 U.S. at 481 n.9, 486 n.12; Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope*, 42 Neb. L. Rev. 483, 564-94 (1962). Accordingly, the confession and admissions admitted below should have been excluded by reason of the constitutional premises of the *McNabb-Mallory* principle.

It is no answer at this juncture in our procedural history to claim that the privilege only protects against testimonial compulsion at trial. See Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Calif. L. Rev. 929, 942 n.72 (1965). *Escobedo* speaks unqualifiedly in terms of the accused's "absolute right to remain silent" in the police station. 378 U.S. at 485. *Malloy* speaks with equal emphasis, although implicitly, by its analogy to the confessions rule and its reliance upon *Boyd* v. *United States*, 116 U.S. 616. 378 U.S. at 6-10. See Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 Ohio State L.J. 449, 466 (1964). The concept is not new; it was recognized twenty-five years ago in *Lisenba* v. *California*, *supra* at 241. And the right to silence in the police station can only derive from the privilege, since the citizen must ordinarily assist and cooperate with the police. See *Stein* v. *New York*, 346 U.S. 156, 184. It can even be fairly maintained that the purpose of the privilege absent a waiver is to protect an accused from all questioning, whether before or at the trial. See Kamisar, *supra* at 25.

Third. Application of the *McNabb-Mallory* principle, or a variant for imposition upon the states, serves as well to

protect a number of additional constitutional rights that were here violated. See Broeder, *supra* at 573-79:

1. Illegal detention, caused by delay in arraignment, *pro tanto* abridges the defendant's right to bail under the Eighth Amendment.

2. Delay in arraignment, involving as it does the unauthorized incarceration of a presumptively innocent suspect for an impermissible purpose, violates the prohibition of cruel and unusual punishments. *Cf. Robinson* v. *California*, 370 U.S. 660, 667.

3. Delay in arraignment inherently involves a deprivation of liberty without due process of law in violation of the Fifth and Fourteenth Amendments:

> " . . . Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused'; *Spano* v. *New York, supra,* at 323, or other like inducement far short of 'compulsion by torture,' *Haynes* v. *Washington, supra,* it follows *a fortiori* that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. . . . " *Malloy* v. *Hogan,* 378 U.S. at 8.

4. Delay in arraignment involves a partial denial of the defendant's right adequately to prepare a defense implicit in the Fifth, Sixth, and Fourteenth Amendment guaranties of due process, right of counsel, right to process for obtaining witnesses, and right to be informed of the nature and cause of the accusation. Delay in this context is particularly odious since it is designed to assist the prosecutor in his preparation for trial.

5. Delay in arraignment involves, *pro tanto*, a suspension of the privilege of the writ of habeas corpus in violation of Article I, Section 9 of the Constitution.

Most important, the illegal detention because of delay in arraignment cuts down and whittles away at the privilege against self-incrimination. Indeed, in light of *Griffin* v. *California*, 380 U.S. 609, the conclusion is inescapable that such detentions are fraught with Fifth Amendment consequences. In *Griffin*, the defendant never uttered a sound at trial (or presumably before). Here, on the other hand, where petitioner was obliged to testify upon deposition without counsel present and while in custody, can it reasonably be argued that the illegally protracted detention, with all the coercive impingements of the station house, did not cut "down on the privilege"? 380 U.S. at 614.

It has been suggested that there can be no state analogy to the *McNabb-Mallory* rule, because the Constitution does not require bringing an accused before a magistrate. See Note, 73 Yale L.J. 1000, 1001 n.8, 1011 n.69 (1964). But, as noted above, most of the states do have prompt arraignment statutes similar to New York's, and all of them do have magistrates. Even in their absence, constitutional liberties hardly depend upon such specifics; the Constitution does not permit unlimited police detention. As we have said, freedom of movement and association is at once abridged and, since the police do not commit to bail or assign counsel, Sixth and Eighth Amendment rights as well. Finally, since a valid arrest does not contemplate indefinite detention, the Fourth Amendment protection against seizure of the person is likewise affected.

Thus, while we are dealing with a number of constitutional rights previously "declared enforceable against the

States," we have yet to see "the same sanction of exclusion as is used against the Federal Government." *Mapp* v. *Ohio*, 367 U.S. at 655. That constitutional deformity is no less fundamental here than it was in the case of unreasonable search and seizure.

III.

The Fifth and Sixth Amendments Require That the Conviction Be Reversed.

While either of the foregoing approaches to the present case requires reversal, because of the importance of the question involved, the disagreement among the lower courts, see Note, Temple L.Q. 97, 100 (1965), and the grant of certiorari this Term to four related cases, Nos. 759, 761, 762, 584, petitioner suggests the following principle to govern his situation and the many like it.

First. As we have seen, lengthy police detention often raises interrelated questions under the Fifth and Sixth Amendments (and the Fourth Amendment, as well, where the suspect is iliegally seized or held over-long). Rather than decide each case according to the particular right most seriously aggravated, the Court can deal with the generality of police detention cases by articulating a rule that renders meaningful most of the protected rights of the affected amendments, in tandem. *Cf. Griswold* v. *Connecticut*, 381 U.S. 479, 484-85. Thus, beginning with the inchoate Fourth Amendment issue inevitably present when a person is apprehended, the Court should expand upon the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643, and *Wong Sun* v. *United States*, 371 U.S. 471, to cover all police detention and all police interrogation whenever the accusatory stage of the

criminal proceeding has been reached or whenever the detention has become unlawful.

The principle suggested, derived from a composite of past decisions, is simple. It would render inadmissible at state trials incriminating statements obtained during any stage of the criminal proceeding unless the accused had been effectively warned of his rights and had been given effective opportunity to exercise them. To insure adequate protection of those rights, it would further render inadmissible any incriminating statements obtained from an accused during a period of illegal detention under any circumstances. In practice, it would operate as follows: When the proceeding has become accusatory, the police or prosecutor will be obliged to warn the accused of his absolute constitutional right to silence and of his right to consult with counsel *before* talking any further with the police. If the accused thereupon intelligently and effectively waives his right to silence and his right to immediate consultation with counsel, the interrogation can continue. If the accused wishes to consult with previously retained counsel, he will be permitted to do so and the interrogation will not continue while the police are awaiting the lawyer's arrival. If the accused does not already have counsel and is indigent, the police may adopt one of two procedures. They may suggest the local public defender or Legal Aid Society and provide access to telephone communication. On the other hand, if the police are unwilling or unable to recommend such counsel, they will simply terminate the interrogation at that point.

In the event counsel comes to the station house, interrogation will or will not continue thereafter, depending on the particular lawyer's advice. The lawyer's continued pres-

ence will likewise be a matter for his determination. If the accused waives his right to silence and his immediate right to counsel, the interrogation may continue but only during a period of reasonable detention in the sense of *Mallory* v. *United States,* 354 U.S. 449, that is, during the routine administrative process of identification, booking, fingerprinting, and transporting the accused to arraignment or preliminary hearing.

After a reasonable period for these administrative procedures has elapsed, if the accused has not then been brought before a judicial officer, the interrogation must terminate notwithstanding the prior waiver. At this point the rule analogous to *McNabb-Mallory* will come into play as a result of the Fifth Amendment privilege against self-incrimination. Under that privilege, it would be presumed that the accused's right to be free from testimonial compulsion was being undermined by the illegal detention and hence that the prior waiver, made in police custody, was not effective. And it would be presumed that the prior waiver, in any event, did not include waiver of the accused's right to be free of illegal restraint, that is, it could not be deemed to have contemplated police illegality. Thus, if the police obtain a confession or admissions after the accusatory stage has been reached but in the absence of effective waiver or in the face of a request to consult with counsel that is not honored, or if the confession or admissions are obtained during a period of illegal detention, they cannot be introduced at a subsequent trial of that accused.

Second. The suggested practice may appear unnecessarily detailed, precisely the code of criminal procedure that Judge Friendly feels the Court should not endeavor to draft. Friendly, *supra* at 953-56. The description set forth above,

however, is merely a series of specific examples to show how the principle would work. That principle, stark in its simplicity, is founded on *Escobedo* v. *Illinois*, 378 U.S. 478, and *Malloy* v. *Hogan*, 378 U.S. 1, taken together. It is necessary to view those decisions together, because their combined application can govern the vast majority of in-custody situations, and at the same time lend predictability to the scope and permissible methods of criminal investigation.

Escobedo must be amplified by an exclusionary rule based in part on *Malloy*, because the alternative—necessary to forestall police abuse by means of prolonged detention of the limited waiver concept—would be automatic assignment of counsel at the station house, an impractical solution and one which the police are ill-equipped to achieve. While it has been suggested that immediate assignment of counsel is required under *Escobedo*, Note, 32 U. Chi. L. Rev. 560, 579-80 (1965), the Court has emphasized that the Fifth and Sixth Amendment rights at stake during a detention can be waived. 378 U.S. at 490 n.14. On the other hand, under *Johnson* v. *Zerbst*, 304 U.S. 458, 464, the burden is on the police to establish that there has been a waiver. Here, the burden will be especially heavy, because the party alleged to have waived will be in the control of the party alleging waiver. *Cf. Commonwealth ex rel. Craig* v. *Maroney*, 352 F.2d 30, 31 (3d Cir. 1965); *Pece* v. *Cox*, 74 N.M. 591, 396 P.2d 422 (1964) (warning typed on the confession). And if the accused is not competent to waive his constitutional rights, the police will simply have to choose between ending the interrogation and providing access to counsel.

To establish waiver, the police will not only have to prove it as a matter of record, presumably signed or initialed by

the accused (and perhaps electronically recorded), they will also have to treat it with some constitutional respect. In other words, if the detention becomes prolonged the prior waiver will be deemed ineffective and the privilege against self-incrimination will become absolute and applied in a manner similar to that required by *McNabb-Mallory*. Such a tandem approach to the Fifth and Sixth Amendment rights will prevent police abuse of the waiver doctrine and yet will permit reasonable investigation and questioning.

For example, it will ordinarily permit street corner investigation and some questioning and screening at the station house to verify alibis, place witnesses in line-ups, and the like. Moreover, some post-arrest interrogation will still be permissible. While investigative arrests without probable cause have been curtailed by *Wong Sun*, at least where a confession results from the arrest, questioning will be permitted after apprehension on probable cause so long as the accusatory stage has not been reached. *Cf.* DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 35 (1958). That will depend on the facts of the particular case, but, as the facts here indicate, it will not be unusual if some questioning is appropriate after the apprehension. Petitioner appears to have been arrested on probable cause, because he was identified by a confederate. The initial police investigation afforded him an opportunity to disprove, if he desired, that accusation. His right to counsel probably did not attach, however, until after he reached the police station and was identified by the eyewitnesses. At the very least, it attached at the time of his *de jure* arrest; under either interpretation of the present facts, some time elapsed between petitioner's apprehension and the commencement of the criminal proceeding against him.

Third. The principle suggested will not put an end to all criminal investigation or police questioning at the station house.* Indeed, it will not be dissimilar in operation from that under which federal law enforcement agents presently perform with such success. See Hoover, *Civil Liberties and Law Enforcement: The Role of the FBI*, 37 Iowa L. Rev. 175, 178, 182 (1952). *Cf.* U.C.M.J., art. 31(b), 10 U.S.C. § 831(b). As for possible effect on the crime rate, we should heed the advice of a former prosecutor who functioned ably in a jurisdiction governed by *McNabb-Mallory*:

> "... Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin on a tumor of the brain." Address by David C. Acheson, October 15, 1964, quoted in Herman, *supra* at 500 n.270.

See also REPORT AND RECOMMENDATIONS OF THE COMMISSIONER'S COMMITTEE ON POLICE ARRESTS FOR INVESTIGATION 17 (1962) (Horsky Report); Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 Cornell L.Q. 436, 454-71 (1964). Nor will it be necessary for the police to assign counsel. If the accused waives his then-existing rights, interrogation may continue. In the absence of a meaningful waiver, the police can choose between permitting consultation with counsel or terminating any further interrogation.

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* It is interesting that one of the cases cited by Chief Judge Lumbard in *United States* v. *Cone*, No. 29345 (2d Cir. Nov. 22, 1965) at 3404, as evidence of the need for broad police powers of investigation, involved offensive police conduct raising serious questions of coercion in the traditional sense. See *United States ex rel. Daniel* v. *Wilkins*, 292 F.2d 348 (2d Cir. 1961), *cert. denied*, 372 U.S. 917.

Application to the states of such a principle should promote "the avoidance of needless conflict between state and federal courts" upon which, it was said in *Elkins* v. *United States*, 364 U.S. 206, 221, "the very essence of a healthy federalism depends." The importance of obtaining state and federal adherence to "the same fundamental criteria" was further stressed in *Mapp*, 367 U.S. at 658, especially where the rights asserted by the state accused draw on the same constitutional fount as those guaranteed his federal counterpart. Finally, the principle should largely eliminate the necessity in confession cases of inquiring into the nagging question of inherent coercion. See *Herman, supra* at 452-58.

The Court in the past, *e.g.*, *Brown* v. *Board of Education*, 347 U.S. 483, has overcome the national fallacy of assuming that "what is familiar is what is right." See Remarks of Yale Kamisar, *Dedication Ceremonies, University of Kentucky College of Law Building*, Dec. 4, 1965, p. 30. Similarly, the Court is now called upon to alter, and thereby to civilize, the American folk ritual of longstanding. In the process it will save the police station from forever remaining our "vestibule of . . . Hell." See ALBERT CAMUS, THE FALL 84 (O'Brien Trans. 1956). It will enable local police and prosecutors to acquire some very necessary self-respect and respect for the system they serve. It will enable disadvantaged persons and minority groups to confront the police with something less than the skepticism that has gone before and unfortunately had such an exacerbating influence on the major issue of our time. See Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 Mich. L. Rev. 47, 54 (1965); *Escobedo* v. *Illinois*, 378 U.S. 478, 490 n.13.

The Government is not neutral when it proceeds criminally against the individual; the corresponding duty arising from that action must be to insure absolutely that the constitutional protections are available to whomever proceeded against.

Conclusion

For the foregoing reasons, the judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted,

VICTOR M. EARLE, III
Counsel for Petitioner.

January 11, 1966.

APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

Article I, Section 9:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Code of Criminal Procedure

Section 165:

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

Section 188:

When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had.

Section 189:

He must also allow the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the town or city, as the defendant may name. The officer must, without delay and without fee, perform that duty.

NEW YORK PENAL LAW

Section 1844:

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate having jurisdiction to take his examination, is guilty of a misdemeanor.

Argued by
WILLIAM I. SIEGEL

IN THE

Supreme Court of the United States

October Term, 1965

No. 760

MICHAEL VIGNERA,

Petitioner,

—against—

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement

The writ of certiorari is addressed to the New York Court of Appeals in review of its order dated April 15, 1965 which affirmed a judgment of the Appellate Division of the Supreme Court, Second Judicial Department dated May 4, 1964. That judgment affirmed (i) a judgment of the former Kings County Court rendered November 3, 1961 convicting petitioner after a jury trial of Robbery in the First Degree and sentencing him as a third felony offender to a term of imprisonment of thirty to sixty years; and (2) a judgment of the Supreme Court, Kings County, dated February 6, 1963 which, after a hearing, resentenced him as a second felony offender to the same term of imprisonment (R 31-33). The resentence was necessitated by the vacature by

the United States District Court for the Western District of New York by order made December 31, 1962 (R 31-32), *Vignera* v. *Wilkins,* Fed. Supp. of an underlying Florida judgment of conviction on the ground of constitutional invalidity.

Opinions Below

The memorandum decision of the Appellate Division affirming the judgments of conviction is reported at 21 A D 2d 752 (R 33) and the memorandum decision of the New York Court of Appeals is reported at 15 N Y 2d 970. The certification by the Court of Appeals of a constitutional question, by order amending the remittitur, is reported in 16 N Y 2d 614. It reads (R 40-41):

> "1. Whether, in the circumstances of this case, the admission in evidence of a confession elicited prior to arraignment by an Assistant District Attorney from defendant-appellant and recorded by a stenographer constituted a denial of his rights under the Fourteenth Amendment to the United States Constitution;
>
> 2. Whether, in the circumstances of this case, the admission in evidence of police testimony as to statements elicited from defendant-appellant constituted a denial of his rights under the Fourteenth Amendment of the United States Constitution.
>
> The Court of Appeals held that no rights of the defendant-appellant under the Fourteenth Amendment to the United States Constitution has been violated" (16 N Y 2d 614, 209 N.E. 2d 110 (1965)) (R 40-41).

Jurisdiction

The petition for the writ of certiorari was granted by this Court on November 22, 1965 and is reported in 86 Sup. Ct. 320 (R 41). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Questions Presented

Petitioner contends:

(1) That a confession elicited from an arrestee by an Assistant District Attorney and recorded by a stenographer, prior to arraignment but at a time when the questioned person had for some hours been under police detention as the prospective accused, and who was not advised of his right to counsel or of his right not to speak, was constitutionally inadmissible against him despite his failure to request counsel.

(2) That detention without arraignment for the period involved in the case at bar "for the purpose of eliciting incriminating statements prior to arraignment" violates the arrestee's constitutional rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments and thus renders inadmissible against him in a State criminal trial the statements elicited through questioning by State authorities.

With respect to the first contention, it is New York's position that the incriminatory product of the questioning is admissible.

Concerning the alleged purpose of the detention prior to arraignment, New York denies that there is evidence of such purpose; and in any event contends that even if such were the purpose, detention of this character does not in and of itself render incriminatory statements or full confessions inadmissible as evidence against their maker.

Record Facts Material to the Questions Presented

In the late afternoon of October 11, 1960 Harry Adelman, the owner of a Brooklyn dress shop, was robbed by a man armed with a knife. His wife was also threatened with the knife by the robber (R 6), as was a saleswoman (R 8). Adelman was deprived of considerable cash (R 9-10). He next saw the robber (whom he identified in open Court as the petitioner) on October 14th in the police station (R 10). There he also identified him (R 11).

Mrs. Gertrude Adelman corroborated the testimony of her husband concerning the robbery, the detention of the saleswoman at knife point (R 13), and her husband's forced surrender of money (R 14). She, too, made a Courtroom identification of the petitioner as the robber (R 15).

Anita Waldinger, the saleswoman, testified in substance as had Mr. and Mrs. Adelman (R 16). She had been present in the police precinct and had heard petitioner answer "from the dress shop" when a detective asked him "How do you know these people?" (R 17).

Vito Lentini, a stenographer employed by the District Attorney, verified a statement (R 19) given to the District Attorney's representative on October 14, 1960 by petitioner in which he admitted the perpetration of the robbery (R 20-21). It was taken at 11:05 P.M. October 14, 1960 (R 30).

Detective John Gillen received the first report of the robbery on October 11th, almost immediately after its occurrence. He arrested petitioner on October 14th at 3:00 P.M. (R 22) after petitioner had admitted his guilt of the robbery while armed with a toy gun. On the next day, however, "going to Court", he told Gillen that the weapon was a knife. When the victims came to the precinct, Gillen asked petitioner: "Michael, do you know who these people are?" and the petitioner answered: "That's the man I held up", referring to Mr. Adelman (R 23).

When, under cross-examination, Gillen was asked if he had advised petitioner "of his right of counsel", the trial Court sustained the prosecutor's objection (R 24).

There is no affirmative evidence in the record that petitioner was not advised and warned. We concede for purposes of this case, however, that the trial Court's ruling effectively prevented petitioner from proving the absence of advice and warning, if such absence there were. We further concede that in this posture of the record the questions presented to the Court are properly before it.

Similarly we raise no objection to the consideration of the confession made by petitioner to the District Attorney. Here again, no proof exists in the record whether or not appellant was given the advice and warning. However, the recorded confession (R 30-31) contains none. Therefore we again concede that the questions presented to the Court concerning this recorded confession are properly before it.

He also testified that Adelman and Mrs. Waldinger had identified petitioner as "the man that held him up" (R 24).

Edward Nemeth was given Mr. Adelman's Diners Club card by petitioner on the early morning of October 14, 1960.

He was arrested while attempting to utilize it in the purchase of jewelry which, according to their mutual plan, petitioner would "give me some money for it" (R 27).

POINT I

It is not required of the several States by any provision of the Federal Constitution that an arrestee be advised at any stage of interrogation by the public authority of his right to counsel or of his right to keep silent: Nor is there any constitutional requirement that he be warned of a possible use of these statements against him.

Petitioner's argument, concisely put, is that because he was at the time of his interrogation by the District Attorney not only formally arrested but, more, the intended accused in subsequent judicial proceedings, he was constitutionally entitled, as an obligatory preliminary to interrogation, to be advised and warned. The failure thus to advise and warn him rendered his confession constitutionally inadmissible in evidence against him.

He bases this contention upon a number of grounds which we shall discuss in this brief. At this point it is New York's answer that the Federal Constitution lays no such obligation upon the several States; that this Court has never declared the existence of such obligation; and that the Court should not now for the first time bring it to life.

Petitioner's first reliance is upon the Court's ruling in *Escobedo* v. *Illinois*, 378 U.S. 478, which, he argues, either directly or by necessary intendment surrounds him with the protections which he claims for himself. He seeks to

buttress this case by decisions of which *People* v. *Dorado*, 42 Cal. 169, 398 P. 2d 361, cert. den. 381 U.S. 937, is typical. Our answer is that neither directly nor by necessary intendment can *Escobedo* be considered as supporting petitioner's argument.

This Court first took jurisdiction to review judgments of conviction in States Courts based upon coerced confessions in 1936 (*Brown* v. *Mississippi*, 297 U.S. 278). It declared that a conviction resting either in whole or in part upon confessions coerced from the defendants by horrible and almost medieval mistreatment violated the Due Process Clause of the Fourteenth Amendment. It rejected the contention that Mississippi's misconduct was, if violative at all, violative of the Fifth Amendment—then not obligatory upon the several States. *Twining* v. *New Jersey*, 211 U.S. 78; *Snyder* v. *Massachusetts*, 291 U.S. 97. The Court unanimously held that it was not the Fifth Amendment, but the Fourteenth, which controlled. Hughes, C.J. wrote for a unanimous Court:

> "The compulsion to which the quoted statements refer is that of the process of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."

This Court has since passed upon the constitutional validity of confessions grounding some three dozen State judgments of conviction. Most of these judgments have been reversed because of the coerced nature of the confessions as tested by the standards which the Court has evolved within the framework of the Due Process Clause. It suffices to mention but a few: *Chambers* v. *Florida* (1939), 309 U.S.

227; *Malinsky* v. *New York* (1945), 324 U.S. 401; *Haley* v. *Ohio*, 332 U.S. 596 (1948); *Spano* v. *New York*, 360 U.S. 315 (1959); *Fikes* v. *Alabama*, 352 U.S. 191; *Rogers* v. *Richmond*, 365 U.S. 534 (1961); *Culombe* v. *Connecticut*, 367 U.S. 568 (1961); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963); *Haynes* v. *Washington*, 373 U.S. 503 (1963).

Through all these cases runs, as the principle of decision, the philosophy expressed by Frankfurter, J. in *Culombe*, *supra*:

> "In light of our past opinions and in light of the wide divergence of views which men may reasonably maintain concerning the propriety of various police investigative procedures not involving the employment of obvious brutality, this much seems certain; it is impossible for this Court, in enforcing the Fourteenth Amendment, to attempt precisely to delimit, or to surround with specific, all-inclusive restrictions, the power of interrogation allowed to state law enforcement officers in obtaining confessions. No single litmus-paper test for constitutionally impermissible interrogation has been evolved; neither extensive cross-questioning—deprecated by the English judges; nor undue delay in arraignment—proscribed by McNabb; nor failure to caution a prisoner—enjoined by the Judges' Rules; nor refusal to permit communication with friends and legal counsel at stages in the proceeding when the prisoner is still only a suspect—prohibited by several state statutes. See Lisemba v. California, 314 U.S. 219, 87 L. ed. 166, 62 S. Ct. 280; Crooker v. California, 357 U.S. 433, 2 L. ed. 1448, 78 S. Ct. 1287; Ashdown v. Utah, 357 U.S. 426, 2 L. ed. 1443, 78 S. Ct. 1354.
>
> Each of these factors in company with all of the surrounding circumstances—the duration and condi-

> tions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self control—is relevant. The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years; the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. Rogers v. Richmond, 365 U.S. 534, 5 L. ed. 2d 760, 81 S. Ct. 735. The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession."

In more summarized form this principle is thus expressed in *Culombe, supra*:

> "Its essence is the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

In *Lynumn, supra,* the Court reaffirmed the underlying rule and governing principle that:

> "* * * the question in each case is whether the defendant's will was overborne at the time he confessed."

In *Spano, supra*:

> "The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; * * *"

And as late as 1963 the Court held in *Haynes, supra*:

> "In short, the true test of admissibility is that the confession was made freely, voluntarily, and without compulsion or inducement of any sort."

There have of course been instances among these three dozen cases where members of the Court have differed with each other as to final decision. The differences, however, have not been grounded on conflicting points of view concerning the test, but on differing estimates as to voluntariness or involuntariness of the facts of the cases.

New York's own test for determining voluntariness of confessions is identical with the one adhered to by this Court. It is crystallized in Code Crim. Pro. § 395:

> § 395. Confession of defendant, when evidence, and its effect.
>
> A confession of a defendant, whether in the course of judicial proceedings or to a private person, can be given in evidence against him, unless made under the influence of fear produced by threats, or unless made upon a stipulation of the District Attorney, that he shall not be prosecuted therefor; but is not sufficient to warrant his conviction, without additional proof that the crime charged has been committed."

Petitioner contends that *Escobedo* supersedes,—and if it does not supersede, at least supplements—this long-standing State and Federal rule, by requiring that not only shall a confession be voluntary and free from coercive taint, whether physical or mental, but that in addition it must have been elicited from the arrestee in his full knowledge of his right to counsel and to silence after advice and warning thereof by the public authority. We have referred to support for his contention in *People* v. *Dorado, supra.* There are other cases, both State and Federal, in agreement: *People* v. *Neely,* 395 P. 2d 557 (Oregon, 1964); *State* v. *Dufour,* 206 A. 2d 82 (Rhode Island, 1965); *Campbell* v. *State,* 384 S.W. 2d 4 (Tennessee); *United States ex rel. Russo* v. *New Jersey,* 351 F. 2d 429.

There are, however, many cases, both State and Federal, which, supporting our position, have determined that *Escobedo* enunciated no general rule requiring warning; that it holds only that where counsel is denied access to a defendant then already suspect, or the defendant is denied access to counsel, there occurs a violation of the Sixth Amendment right to the assistance of counsel.

We cite *People* v. *Gunner,* 15 N Y 2d 226; *People* v. *Dusablon,* 16 N Y 2d 9; *People* v. *Hartgraves,* 31 Ill. 2d 375, cert. den. 380 U.S. 961; *Commonwealth* v. *Tracy,* 207 N.E. 2d 16 (Massachusetts); *Parker* v. *Warden,* 236 Md. 236 (Maryland); *State* v. *Winsett,* 205 A. 2d 510 (Delaware); *Bean* v. *State,* 398 P. 2d 251 (Nevada); *State* v. *Smith,* 43 N.J. 67; *State* v. *Stinson,* 139 S.E. 2d 558 (North Carolina); *Commonwealth* v. *Coyle,* 415 P.A. 379 (Pennsylvania); *Ward* v. *Commonwealth,* 138 S.E. 2d 293 (Virginia); *Brown* v. *State,* 131 N.W. 2d 169 (Wisconsin);

United States v. *Cone*, 2d Cir. Court of Appeals, decided November 22, 1965; *United States* v. *Robinson*, 2nd Cir. Court of Appeals, decided November 22, 1965.

We quote from New York's *People* v. *Gunner, supra* (including the implied dissent by only two of the seven members of the Court of Appeals):

> "As previously noted, the defendant, for his part, urges that the Appellate Division directed the exclusion of too few statements; that court should, he says, have also ruled out several additional statements which he made before his attorney communicated with the police. Relying on People v. Dorado (394 P. 2d 952, on rehearing 62 Cal. 2d 350, 62 A.C. 350) and certain language in Escobedo v. Illinois (378 U.S. 478, 490 et seq.), the defendant contends that the statements obtained by the police, in the absence of counsel, after his arrest should be held inadmissible, even though he never requested a lawyer and none appeared in his behalf at the time, since he was then the 'prime suspect' and the object of interrogating him was not to solve a crime but to elicit a confession. At such point, the defendant argues, he became entitled to the aid of counsel (if he so decided) and, accordingly, it was incumbent upon the police to advise him of his right to refrain from answering any questions and also of his right to a lawyer.
>
> The Court finds this argument without merit; the majority is of the opinion that the rule heretofore announced in our decisions (see, e.g., People v. Failla, 14 N Y 2d 178, supra; People v. Donovan, 13 N Y 2d 148, supra; People v. Myers, 11 N Y 2d 162; People v. Noble, 9 N Y 2d 571; People v. Waterman, 9 N Y 2d 561; People v. DiBiasi, 7 N Y 2d 544) should not be

> extended to render inadmissible inculpatory statements obtained by law enforcement officers from a person who, taken into custody for questioning prior to his arraignment or indictment, is not made aware of his privilege to remain silent and of his right to a lawyer even where it appears that such person has become the target of the investigation and stands in the shoes of an accused. Thus, the court answers in the negative the question posed but not passed upon in People v. Stanley (15 N Y 2d 30, 32). The Chief Judge and I take a different view and would exclude the additional statements which the defendant made after his arrest and before his lawyer communicated with the police (See People v. Dorado, 62 Cal. 2d 350, 361-363, supra.)"

Petitioner's brief (p. 17 seq.) is critical of *Gunner* and similar decisions, saying *inter alia*:

> "The Courts that have so limited application of Escobedo have acted by simple *ipsi dixit*. Their opinions have not developed a rationale for the distinction nor have they attempted to rebut criticism of it. It is remarkable that the New York Court of Appeals would take this tack in light of its significant right to counsel decisions (citing.)"

The brief also brings within the sweep of its condemnation other participants in government (p. 23):

> "It is hardly suprising that the criticism in large part has emanated from spokesmen for law enforcement agencies, for example, Los Angeles Police Chief Parker."

We shall, we trust, be pardoned for observing that the many Courts which disagree with petitioner's analysis of

Escobedo and the law enforcement agencies who have "criticized" the decision (and the choice of language is petitioner's and not ours) are entitled to a presumption that they are citizens as well as agents of government; and that they, too, have a concern for individual liberties. A disagreement in principle is not necessarily proof of a lesser regard for constitutional law.

We assert that petitioner can find no warrant for his position in *Escobedo, supra;* neither on its facts nor in its law.

While Escobedo was under interrogation in a police station his retained lawyer arrived and repeatedly requested, but was denied, an opportunity to speak with him. Counsel and Escobedo actually saw each other in the precinct; and the police knew this. Escobedo's repeated requests during his interrogation to speak to counsel were denied. Eventually—and after these refusals—he confessed to an Assistant States Attorney the commission of murder. In holding, for a majority of five of this Court, that Escobedo's confession was constitutionally barred by the Sixth, (through the Fourteenth) Amendment, Goldberg J. noted that Escobedo had already

> "become the accused, and the purpose of the interrogation was to 'get him' to confess his guilt despite his constitutional right not to do so."

The majority opinion makes it clear beyond possibility of partisan extension that *Escobedo* was intended to be, and must be, limited to these exact facts. Its first paragraph reads:

> "The critical question in this case is whether, under the circumstances, the refusal by the police to honor

> petitioner's request to consult with his lawyer during the course of an interrogation constitutes a denial of 'the Assistance of Counsel', in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment, Gideon v. Wainwright, 372 U.S. 335, 342, and thereby renders inadmissible in a State criminal trial any incriminating statement elicited by the police during the interrogation."

Its concluding paragraph reiterates the limited application of its holding:

> "Nothing we have said today affects the powers of the police to investigate 'an unsolved crime', Spano v. New York, 360 U.S. 315, 327 (Stewart, J. concurring), by gathering information from witnesses and by other 'proper investigative efforts' Haynes v. Washington, 373 U.S. 503, 519. We hold only that when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate, *and, under the circumstances here, the accused must be permitted to consult with his lawyer.*" (Italics ours).

Certainly this is the understanding of *Escobedo* not only of New York's Court of Appeals (*People* v. *Gunner, supra*), but by the respected Court of Appeals for the Second Circuit (*United States* v. *Cone, supra*) in which at least six of the ten Judges sitting *en banc* concurred in the statement by Lombard, C.J.:

> "While Escobedo may have extended the Sixth Amendment's protection by shifting the focus of the examination by which the admissibility of prearraignment statements is tested, that decision can-

> not be divorced from its particular facts; we would be misreading Escobedo if we extended it to embrace every inculpatory statement, made prior to arraignment and without full warning, by any person whom the police suspected of crime. Wherever the bar created by the Escobedo decision may ultimately be held to fall, it does not come so early in the process of police investigation as the interrogation here."

But one Judge (Smith, C.J.) dissented; and three Judges concurred.

Nor is it unimportant that four members of this Court dissented even from the limited application which the majority of five gave it. Mr. Justice Stewart in dissent, while recognizing the right of a defendant not to be interrogated in the absence of counsel *after indictment,* insisted that Sixth Amendment rights affecting a criminal prosecution do not come into play until "the institution of formal, meaningful judicial proceedings, by way of indictment, information, or arraignment, * * *" and that it is this "institution" which "* * * marks the point at which a criminal investigation has ended and adversary proceedings have commenced. It is at this point that the constitutional guarantees attach which pertain to a criminal trial," including "the guarantee of the assistance of counsel".

Mr. Justice White in a dissenting opinion in which Clark and Stewart, J.J. joined, viewed the majority opinion in *Escobedo* as an unnecessary, erroneous and hampering abandonment of "the voluntary-involuntary test for admissibility of confessions." He referred to *Hamilton* v. *Alabama,* 368 U.S. 52; *White* v. *Maryland,* 373 U.S. 59; *Gideon* v. *Wainwright, supra,* and noted strongly that:

> "These cases dealt with the requirement of counsel at proceedings in which definable rights could be won or lost, not with stages where probative evidence might be obtained."

He concluded with this observation:

> "Until now there simply has been no right guaranteed by the Federal Constitution to be free from the use at trial of a voluntary admission made prior to indictment."

Harlan, J.'s agreement with White, J. was succinctly expressed:

> "Like my Brother White, Post p. 988, I think the rule announced today is most ill-conceived and that it seriously and unjustifiably fetters perfectly legitimate methods of criminal law enforcement."

It is beyond contradiction that in the case at bar there is not even a suggestion of impermissible coercion in the procurement of the confession.

The same thought was cogently expressed by Lombard, C.J. in *Cone, supra*:

> "We do not agree and we find nothing in Escobedo which supports such a rule or which requires its extension to defendants who are questioned immediately upon their arrest. Text, context and history of the Sixth Amendment lead to the conclusion that the framers were addressing themselves to judicial proceedings, where a person is obliged to defend himself in a process fraught with the technicalities and the procedural niceties of the criminal law. This protection has been extended to preliminary hearings before a Magistrate, also part of the criminal prosecution."

Petitioner adds another string to his bow. He urges that if *Escobedo* does not compel the reversal of his conviction, this Court should effectuate that result because a confession was procured "during a period of illegal detention". He says that "a confession obtained during periods of unlawful detention should be subjected to a scrutiny similar although not identical to that demanded by *McNabb* v. *United States*, 318 U.S. 332, and *Mallory* v. *United States*, 354 U.S. 449."

Initially we deny that petitioner was illegally detained in violation of either New York's Code of Criminal Procedure, § 165 or of constitutional principle. That statute provides:

> "§ 165. Defendant, upon arrest, to be taken before magistrate.
>
> The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night."

Petitioner argues that since by 3:00 o'clock in the afternoon of October 14th there was proof of his guilt in the fact of his admission to Detective Gillen (R 23-23), he should have been arraigned before the 4:00 o'clock closing of the New York City Magistrates Court; and if not by 4:00 o'clock, at least some time during October 14th.

It is our submission that the argument does violence to any reasonable construction of the facts.

It is true that New York City Criminal Courts Act, § 101, requires the Magistrates Court to be open from 9:00 o'clock A.M. until 4:00 o'clock P.M. for the performance of judicial duties, including arraignment of defendants charged with

the commission of felonies. But small argument is needed, however, to demonstrate that the one hour which intervened between the 3:00 o'clock cut-off which petitioner assumes as the basis for his contention and the 4:00 o'clock closing time of the Magistrates Court is a demonstrably narrow and insufficient foundation for a charge of illegal delay in arraignment in obedience to Code Crim. Pro. § 165. Petitioner disregards the fact that there are police procedures (not only sanctioned by the Courts but required by statute) which must be followed before a defendant may be arraigned. Thus, an arrested person has the important right to be admitted to bail. A Magistrate, however, lacks the power to admit to bail with respect to a charge of felony without assuring himself "from the defendant's fingerprints or otherwise", that the defendant is free of such previous criminal record as deprives the Magistrate under Code Crim. Pro. § 552 of the power to admit to bail. Fingerprints disclosing prior convictions cannot be procured either immediately or in a matter of moments since a comparison must be made between those taken at the precinct (Code Crim. Pro. § 940) and those on file with the New York City Bureau of Criminal Identification.

Nor could petitioner have been arraigned after 4:00 o'clock. While the New York City Criminal Court Act does create Night Courts (§ 109) to function after the closing of the Magistrates Felony Court, the Night Courts are specifically excluded from consideration of cases involving felony charges. Only the Felony Court, specially created by Sec- to fulfill that purpose, has such power. Therefore, even if it had been improbably physically possible in petitioner's

case to have performed the obligatory check of his fingerprints with past records on the day of his arrest, no Court was in session in which he could be arraigned (except in the improbable case that the check would have been made within less than an hour). It is for this reason that we assert with complete confidence that under no view of New York law can a case be found which holds that failure to arraign within one hour constitutes "unnecessary" and therefore illegal, delay in arraignment. We are equally confident that there is no Federal case which, reviewing State judgments of conviction, has so held.

The contrary practise in Federal prosecutions is the product of the *McNabb-Mallory* rule, implemented by Rule 5-a of the Federal Rules of Criminal Procedure. This was the rule of which Frankfurter, J. said in *Columbe, supra*:

> "The McNabb case was an innovation which derived from our concern and responsibility for fair modes of criminal proceeding in the Federal Courts. The States, in the large, have not adopted a similar exclusionary principle. And although we adhere unreservedly to McNabb for federal criminal cases, we have not extended its rule to State prosecutions as a requirement of the Fourteenth Amendment. Gallegos v. Nebraska, 342 U.S. 55, 63, 64, 96 L. ed. 86, 93, 94, 72 S. Ct. 141 (opinion of Reed, J.); Brown v. Allen, 344 U.S. 443, 97 L. ed. 469, 499, 73 S. Ct. 397; Stein v. New York, 346 U.S. 156, 187, 188, 97 L. ed. 1522, 1544, 1545, 73 S. Ct. 1077; cf. Lyons v. Oklahoma, 322 U.S. 596, 597, 598, 88 L. ed. 1481, 1483, 64 S. Ct. 1208, note 2; Townsend v. Burke, 334 U.S. 736, 738, 92 L. ed. 1690, 1692, 68 S. Ct. 1252; Stroble v. California, 343 U.S. 181, 197, 96 L. ed. 872, 884, 72 S. Ct. 599."

We know of no case in this Court,—and we are confident that there are none,—which hold that illegal delay in arraignment is other than, or more than, a circumstance in the totality of circumstances upon which is determined the basic question of voluntary-involuntary confessions.

Petitioner continues the argument (his brief, Point II) by relating the fact of delayed arraignment to the exclusionary effect of the Fourth Amendment as imposed upon the States by *Mapp* v. *Ohio*, 367 U.S. 643. He argues that since his confession to the District Attorney was the product of the failure to arraign him pursuant to the requirements of Code Crim. Pro. § 165, that confession should be rejected by this Court under the *Mapp* rule which he characterizes (p. 28) as "* * * a true exclusionary rule that frankly operates as a chastisement of the police irrespective of whether the trial is unfair in the customary sense." As he put it (p. 29): "A constitutional rule of exclusion is equally appropriate in the case of illegal detention * * *."

We have, we submit, conclusively shown that there was in this case no illegal detention. We go further: we challenge the assumption that a defendant's rights to the due observance of Code Crim. Pro. § 165 can be secured to him only by an exclusionary rule which can be promulgated by this Court only under the aegis of the Constitution. (We say this because of the fact stressed by this Court in *Columbe, supra,* and other cases that the McNabb-Mallory rule is authorized only by its supervisory powers over the lower Federal Courts and not by the constitutional power which it possesses over the States). It is obvious that if § 165 is to be lodged within the Constitution for the same exclusionary purposes which brought the States within the

Fourth Amendment, there must be proof that a State defendant can be protected in no other way. This Court so concluded when in *Mapp* it overruled *Wolf* v. *Colorado*, 338 U.S. 25. But the contrary is true of the factor of illegal delay in arraignment in State Courts. We cite New York as an example of what is undoubtedly true throughout the country. New York juries have always been instructed by the Court concerning the existence, intent and meaning of Code Crim. Pro. § 165. They have always been charged that it was their duty to give due consideration to the time factors; and they have always been permitted to base an acquittal upon a finding that in the relevant circumstances of the case, delayed arraignment constituted an element of coercion. New York trial Courts now follow the same practice under the requirement of *Jackson* v. *Denno*, 378 U.S. 368.

It is no answer, we submit, to say as does petitioner, (p. 25) that no police officer in New York has ever been prosecuted under Penal Law, § 1844 for wilful and wrongful delay in arraigning a defendant. What is at issue,—what is desirable,—is not the punishment of the individual policeman, but the protection of a defendant's rights.

By the same token, however, is it not too great a price to compel society to pay that, because of the malfeasance or non-feasance of a policeman, society's safety, peace and good order shall suffer a serious blow in the liberation of an admitted criminal? This is by no means a rhetorical question; for there is ample evidence that an undue and unnecessary restriction of the powers of the States to protect themselves against the evil-doer makes crime flourish beyond the effective control of the authorities. If, as petitioner suggests (pp. 24-25) the majority opinions in *Cone, supra,*

and *Robinson, supra,* "all reflect a degree of impatience with certain of the Court's constitutional imperatives that appear to affect criminal investigation", it is not difficult to understand the generative causes of this "impatience". It is true that every individual is a member of society. It is just as true, however, that society is the sum total of all individuals. It would, we submit, be exalting the obligation to protect individual rights beyond all necessary proportion to elevate such rights to a point of precedence before, and predominance over, the demonstrated needs and rights of the community.

Petitioner similarly seeks to relate his cause to the Fifth Amendment. His contentions may be stated in sylogistic form. *Malloy* v. *Hogan,* 378 U.S. 1 imposes the Fifth Amendment privilege against self-incrimination upon the States. Since for all practical purposes the arrest of a citizen is the beginning of the exertion of State power against him, to arrest him and, under continued detention, to interrogate him without advice and warning is equivalent to compulsory self-incrimination; and for that reason just as impermissible as is interrogation without benefit of counsel after arraignment or indictment (which, be it noted, New York does not sanction: *People* v. *DiBiasi,* 7 N.Y. 2d 544; *People* v. *Waterman,* 9 N.Y. 2d 561; *People* v. *Meyer,* 11 N.Y. 2d 162; *People* v. *Rodriguez,* 11 N.Y. 2d 279, any more than it sanctions interrogation after denial of opportunity to consult with counsel, *People* v. *Donovan,* 13 N.Y. 2d 148; *People* v. *Friedlander,* 16 N.Y. 2d 248; *People* v. *Faila,* 14 N.Y. 2d 178; cf. *Massiah* v. *United States,* 377 U.S. 201).

With great deference to counsel, we are compelled to say that this is indeed a Gargantuan leap forward from the

premise of *Malloy* to a stage which the Court did not reach there, had not reached before, and has not since reached.

Malloy, in overruling both *Twining* v. *New Jersey*, *supra*, and *Adamson* v. *California*, 332 U.S. 46, held that the protections against compulsory self-incrimination guaranteed by the Fifth Amendment are "also protected by the Fourteenth Amendment against abridgement by the States". It is to be noted, however, that in *Malloy* the public compulsion was exercised upon the petitioner by a State Court which adjudged him in contempt and imprisoned him for refusal to answer questions upon the ground of incrimination. It is significant, moreover, that the Court discussed and decided *Malloy* within the framework of coercion and found that imprisonment no less than force may not be used to extort from a defendant evidence of guilt. It's ultimate, and essential, ruling barred *testimonial compulsion only.*

What we have said above is, we submit, equally applicable to petitioner's attempt to relate his situation to the Sixth Amendment and its guarantee of the right to counsel which *Gideon* v. *Wainwright*, 372 U.S. 335 makes obligatory on the States via the Fourteenth Amendment (petitioner's Points I and III). He relies upon *Massiah* v. *United States*, 377 U.S. 201, in which this Court held it to be a violation of the defendant's Sixth Amendment rights for a Federal agent to overhear, without defendant's knowledge, incriminating statements made by him in the absence of counsel *after indictment and arraignment* and while free on bail and in ignorance of the fact that he was being overheard. But *Massiah*, it is clear, rests upon the premise that once the indictment had occurred, the judicial process

had begun. Defendant therefore and thereafter became entitled to the constitutional protection of counsel. It certainly did not hold, nor did it even intimate, that this right existed before initiation of judicial processes. That this is so is demonstrated by its quotation from, and approval of *People* v. *Waterman, supra*:

> "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal cases and the fundamental rights of persons charged with crime."

We are, we submit, not overduly simplifying petitioner's argument with respect to the relation of the Fourth, Fifth and Sixth Amendments to his case when we say that he is seeking to move back to the point of arrest the invocation and protection of the rights which he clearly has from the moment when the judicial process of the State begins to operate in relation to the charges against him by way of either indictment or preliminary arraignment. Petitioner does so in specific language (p. 37):

> "First. As we have seen, lengthy police detention often raises interrelated questions under the Fifth and Sixth Amendments (and the Fourth Amendment, as well, where the suspect is illegally seized or held over-long). Rather than decide each case according to the particular right most seriously aggravated, the Court can deal with the generality of police detention cases by articulating a rule that renders meaningful most of the protected rights of the affected amendments, in tandem. Cf. Griswold v. Connecticut, 381 U.S. 479, 484-85. Thus, beginning with the inchoate Fourth Amendment issue in-

> evitably present when a person is apprehended, the Court should expand upon the exlusionary rule of Mapp v. Ohio, 367 U.S. 643, and Wong Sun v. United States, 371 U.S. 471, to cover all police detention and all police interrogation whenever the accusatory stage of the criminal proceeding has been reached or whenever the detention has become unlawful."

(Parenthetically we note that the adoption of such an exclusionary rule would not free Courts from the burden of deciding "each case according to the particular right most seriously aggravated" because Courts would still be under the necessity of determining when the "accusatory" stage had been reached.) Petitioner is obviously, albeit without saying so, asking the Court to repudiate the very principle of decision which Frankfurter, J. enunciated in *Culombe, supra,* heretofore quoted by us (pp. 8-9 of our brief) and from which we re-quote only:

> "Due process does not demand of the States, in their administration of the criminal law, standards of favor to the accused which our civilization, in its most sensitive expression, has never found it practical to adopt."

Petitioner's brief shows little concern over the social dangers inherent in its thesis that police interrogation be so severely curtailed. Indeed, it calls to its aid the opinions of professors and commentators to the effect that such curtailment of police interrogation would not affect to any material degree the discovery and apprehension of persons guilty of crime. We have read some of these disquisitions (and particularly the energetic and bellicose writings of Professor Kamisar). We intend no disrespect to these learned pundits when we say that their opinions are of but minimal value.

We recognize their sincerity and their scholarship. At the same time, however, we are forced to be cognizant of their freedom from official responsibility in the effectuation of their opinions. Much to be preferred we submit, are the beliefs, grounded in experience, and sobered by responsibility, of those whose words are freighted with serious consequences to the community. A great member of this Court, —Mr. Justice Jackson,—wrote in *Watts* v. *Indiana*, 338 U.S. 49:

> "I suppose no one would doubt that our Constitution and Bill of Rights, grounded in revolt against the arbitrary measures of George III and in the philosophy of the French Revolution, represent the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself. They were so intended and should be so interpreted. It cannot be denied that, even if construed as these provisions traditionally have been, they contain an aggregate of restrictions which seriously limit the power of society to solve such crimes as confront us in these cases. Those restrictions we should not for that reason cast aside, but that is good reason for indulging in no unnecessary expansion of them.
>
> I doubt very much if they require us to hold that the State may not take into custody and question one suspected reasonably of an unwitnessed murder. If it does, the people of this country must discipline themselves to seeing their police stand by helplessly while those suspected of murder prowl about unmolested. Is it a necessary price to pay for the fairness which we know as 'due process of law'? And if not a necessary one, should it be demanded by this Court? I do not know the ultimate answer to these questions; but, for the present, I should not increase the handicap on society."

Mr. Justice White, dissenting in *Escobedo*, sapiently observed:

> "This new American judges' rule, which is to be applied in both federal and state courts, is perhaps thought to be a necessary safeguard against the possibility of extorted confessions. To this extent it reflects a deep-seated distrust of law enforcement officers everywhere, unsupported by relevant data or current material based upon our own experience. Obviously law enforcement officers can make mistakes and exceed their authority, as today's decision shows that even judges can do, but I have somewhat more faith than the Court evidently has in the ability and desire of prosecutors and of the power of the appellate courts to discern and correct such violations of the law.
>
> The Court may be concerned with a narrower matter: the unknowing defendant who responds to police questioning because he mistakenly believes that he must and that his admissions will not be used against him. But this worry hardly calls for the broadside the Court has now fired. The failure to inform an accused that he need not answer and that his answers may be used against him is very relevant indeed to whether the disclosures are compelled. Cases in this Court, to say the least, have never placed a premium on ignorance of constitutional rights. If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions would be used against him. When the accused has not been informed of his rights at all the Court characteristically and properly looks very closely at the surrounding circumstances. See Ward v. Texas, 316 U.S. 547, 86 L. ed. 1663, 62 S. Ct. 1139; Haley v. Ohio, 332 U.S. 596, 92 L. ed. 224, 68 S. Ct. 302; Payne v. Arkansas, 356 U.S. 560, 2 L. ed. 2d 975, 78 S. Ct.

844. I would continue to do so. But in this case Danny Escobedo knew full well that he did not have to answer and knew full well that his lawyer had advised him not to answer.

I do not suggest for a moment that law enforcement will be destroyed by the rule announced today. The need for peace and order is too insistent for that. But it will be crippled and its task made a great deal more difficult, all in my opinion, for unsound, unstated reasons, which can find no home in any of the provisions of the Constitution."

Chief Judge Lumbard, speaking out of the experience and wisdom garnered by his membership on a busy Court which constantly reviews both State and Federal judgments based in whole or in part upon confessions, has said:

"The fact is that in many serious crimes—cases of murder, kidnapping, rape, burglary and robbery—the police often have no or few objective clues with which to start an investigation; a considerable percentage of those which are solved are solved in whole or in part through statements voluntarily made to the police by those who are suspects. Moreover, immediate questioning is often instrumental in recovering kidnapped persons or stolen goods as well as in solving the crime. Under these circumstances, the police should not be forced unnecessarily to bear obstructions that irretrievably forfeit the opportunity of securing information under circumstances of spontaneity most favorable to truth-telling and at a time when further information may be necessary to pursue the investigation, to apprehend others, and to prevent other crimes.

Until the need for immediate advice is properly evaluated in light of the probable detrimental effect

of such a requirement—an inquiry that cannot adequately be undertaken by courts examining the facts of particular cases—we think it highly undesirable to lay down a rule which would deprive the police of the opportunity to question suspects and to use such statements as are found to have been given voluntarily and to have been procured fairly. In our country, a most valuable right of law-abiding citizens who make up the great majority of our people is the right to be protected against law breakers and criminal interference with their liberty and property

This right can be enjoyed only if those who have the responsibility for law enforcement are able to apprehend and prosecute an appreciable percentage of wrongdoers and solve an appreciable percentage of serious offenses. A time such as the present, when there is grave and growing public concern about the increasing ineffectiveness of law enforcement, and when there is growing legislative concern about the proper scope of the rights of persons accused of crime, is not a time for the courts to stifle or preempt the attempts to reach a reasoned compromise by announcing novel doctrines, constitutional or otherwise, or by extending old doctrines, in novel ways, so that law enforcement will be further crippled and made more difficult."

McLaughlin, C.J., dissenting in *Russo, supra,* wrote:

"Fairness in crime investigation is no one-way street. A person interrogated with reference to a crime is entitled to full fair play but so is the investigative authority. Due process for law and order—for the public, by proper questioning of suspects has its rightful place under *Escobedo.* The majority here in its enthusiasm would simply eliminate lawful authority from the equal protection of due process. The

destruction of the true balance of criminal justice could well be the net result of the court opinion."

It is of no small importance that Judge Lumbard in *Cone* accepted statistics derived from two California cities in 1960 which "revealed that between 75% and 90% of all persons charged with crime had given confessions or admissions after what the author termed "suprisingly short" periods of interrogation. It is equally significant that he similarly accepted the conclusion of Michael J. Murphy, then Police Commissioner of New York City, "that analysis of 1963 and 1964 New York City murder cases disclosed that 50% of those which had been solved had been solved in whole or in part by a confession."

New York's "growing legislative concern about the proper scope of the rights of persons accused of crime" has already been implemented in legislation.

Code Crim. Pro. § 813-f (Laws of 1965, Chapter 846, § 1, effective July 16, 1965), requires the District Attorney if he "intend to offer a confession or admission in evidence upon a trial of a defendant" to give written notice to that effect within a reasonable time before the commencement of the trial. The defendant may then move to suppress and "the Court shall hear evidence upon any issue of fact necessary to determination of the motion". An appeal from a judgment of conviction will bring up for review an order denying the motion to suppress. (Of course, the People have the right to appeal from an order granting the motion.) The success upon the motion by the defendant makes the confession or admission inadmissible in evidence "in any criminal proceeding against the moving party". As evidence that New York Courts are obeying the mandate of

the Legislature to the benefit of defendants, we cite the decision of Sobel, J. in the Supreme Court, Kings County, in *People* v. *Hernandez* and *King*. (Since the decision is unreported we append a copy to this brief).

This same legislative concern has born fruit of greatest importance. By Chapter 878, Article 18-b, of the Laws of 1965 entitled "Representation of persons accused of crime", the New York Legislature has commanded the governing bodies of all counties and cities within the State to "place in operation by December first, nineteen hundred and sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel". The governmental units are thereby give four choices: (1) the appointment of a public defender; (2) representation by Legal Aid Societies; (3) representation by counsel furnished by Bar Associations under a plan approved by the State's Judicial Conference; or (4) representation under a plan combining any of the foregoing. The term "crime" is defined as being broad enough to cover not only felonies and misdemeanors but even breaches "of any law of this State or of any law, local law or ordinance of a political subdivision of this State" other than traffic violations "for which a sentence to a term of imprisonment is authorized upon conviction thereof." Compensation is provided for counsel assigned by a Bar Association in what we believe to be fair measure. Compensation is payable for appellate as well as trial representation. Provision is made for payment for investigative, expert or other necessary services. The expenses of such representation and service are made a charge upon public funds.

The statute is not restricted in operation to Court appearances. It provides for compensation per hour "for time

reasonably expended out of Court", and for "reimbursement for expenses reasonably incurred". While it is too early to say exactly what representation will eventually be included within the scope of the statute, it is certainly possible to say that consultation with an arrestee is not excluded from its contemplation. It is equally possible to prophesy that under the simulus of contemporary thinking police-precinct representation will very soon be deemed to be within the intended legislative purpose.

We but echo the language of White, J. in *Escobedo* when we acknowledge that there are both law enforcement officers and prosecutors who go beyond the permissible limits of the proper performance of their duties. That perfection which is impossible of attainment by man in general cannot be expected of them. That there are instances of official imperfection is, however, not a valid reason to embed into the Constitution a total prohibition of interrogation except under the tutelage of defense counsel of whom Jackson, J. observed in *Watts* v. *Indiana, supra*:

> "Under this conception of criminal procedure, any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances."

It may well be that the problem presented to this Court by the case at bar and similar cases which the Court will simultaneously consider needs serious consideration and solutions supplementary to—although we do not concede that they should be in substitution of—the voluntary-involuntary test heretofore employed by State Courts and sanctioned by this Court. It is our respectful submission, however, that a judicial fiat is not the proper solution.

Court decrees relate to specific cases and are in theory, at least, binding only with respect to their facts. Nevertheless, they serve as precedents; and precedents can be misinterpreted and misapplied. Better far, we submit, is an explicit code which it lies within the province of legislatures to enact in language broad enough to furnish guidance for all types of cases. We do not share the pessimism inherent in petitioner's statement (p. 25): "Nor can the basic guarantees of counsel and freedom from testimonial compulsion be left to the states for laboratory experiment." We have shown that New York has already embarked on successful and fruitful "laboratory experiment". As experience shows necessity, New York can be trusted to add whatever safeguards of legal rights are reasonably required. And no less may be expected of all the States of the Union.

POINT II

Neither the principle of *Escobedo* v. *Illinois* nor any extension thereof should be held to be retroactive.

Linkletter v. *Walker*, 381 U.S. 618, decided that the exclusionary rule of *Mapp* v. *Ohio, supra,* does not apply to State Court convictions which had become final before its rendition. Clark, J. thus defined "final" (p. 622, footnote 5):

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Mapp v. Ohio."

In the sense of this definition, the judgment under review is not final. It therefore follows that the principle of retroactivity is not here concerned and that the Court will make no decision in this case in the aspect of retroactivity.

Nevertheless, New York has a great interest in the question of retroactivity. There are numerous instances of past criminal judgment in its Courts which for one purpose or another (e.g. to secure freedom where the defendant is still imprisoned; to affect a multiple offender status; or for the more limited but still understandable purpose of erasing a criminal record) would be affected by a decision of this Court holding *Escobedo* and the extension thereof prayed for by petitioner to be retroactive. It is for this purpose that we write upon the subject although we shall not argue the point.

It was pointed out in *Linkletter* that this Court is "neither required to apply, nor prohibited from applying, a decision retrospectively." The application of the doctrine is governed by the nature of the new decision and the consequences of its application to old cases already finalized. The considerations which govern the choice were thus summarized: the purpose of the new decision (as, in *Mapp*, to compel the States to observe Fourth Amendment rights); the number of finalized cases which would be affected by the new decision; and the effect upon the administration of justice of applying the new decision retroactively.

In the same term the Court similarly decided *Angelet* v. *Fay*, 381 U.S. 654 on the authority of *Linkletter*.

Subsequently, and on January 19, 1966, the Court held in *Tehan* v. *Shott*, 34 U.S. Law Week, No. 27, p. 4095, that *Griffin* v. *California*, 380 U.S. 609 (forbidding comment by state prosecutor or Judge on defendant's failure to testify) should not have retroactive effect.

We submit that the same guidelines which led to the holdings in *Linkletter*, *Angelet* and *Tehan* should here be followed.

Here, too, if retroactivity were accorded there would be that serious disruption in the administration of justice of which Clark, J. spoke in *Linkletter*:

> "Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice."

Again, the States would be penalized for following a procedure which this Court had never prohibited.

> "Until Escobedo it had never been seriously urged that the mere failure to advise a suspect of his right to remain silent and his right to counsel would of itself, absent other factors evidencing unfairness or coercion, invalidate the use of any statement made thereafter by the accused" (Lombard, C.J. in United States v. Cone, supra).

This Court had itself affirmed State judgments of conviction in *Cicenia* v. *Legay*, 357 U.S. 504 and *Crooker* v. *California*, 357 U.S. 433, holding confessions to be admissible which were procured after denial of requested opportunity to consult with counsel.

Additionally, there is a great resemblance to be noted between the facts of the case at bar and one of the determining factors of which in *Linkletter* Clark, J. wrote:

> "All that petitioner attacks is the admissibility of evidence, the reliability and relevance of which is not questioned and which may well have had no effect on the outcome."

It is true that petitioner attacks both the admissibility and the reliability of his confession, claiming both to be affected by absence of counsel. The relevancy of the confessions, however, is undoubted. And most important is the probability that their absence from the case "may well have had no effect on the outcome". It is hornbook law that identification of a robber by his victim is, if it is not inherently incredible, sufficient in itself to sustain a conviction. Identification in the case at bar was made by three witnesses and in addition was a self-identification testified to not only by Detective Gillen, but by the witness Waldinger. We are therefore warranted in saying that, even absent both confessions, petitioner would unquestionably have been convicted.

It is, in sum, our respectful submission on this issue that if the judgment of conviction at bar should be affected by the decision which this Court will make, no other New York judgment, already finalized, should be thereby affected.

POINT III

The order of the New York Court of Appeals should be affirmed.

Dated: Brooklyn, New York
February 1966

Respectfully submitted,

AARON E. KOOTA
District Attorney
Kings County

WILLIAM I. SIEGEL
Assistant District Attorney
Of Counsel

APPENDIX A

Constitutional and Statutory Provisions Mentioned

CONSTITUTION OF THE UNITED STATES

Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause

of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Code of Criminal Procedure

§ 165:

The defendant must in all cases be taken before the magistrate without unnecessary delay, and he may give bail at any hour of the day or night.

New York Penal Law

§ 1844:

A public officer or other person having arrested any person upon a criminal charge, who wilfully and wrongfully delays to take such person before a magistrate hav-

ing jurisdiction to take his examination, is guilty of a misdemeanor.

NEW YORK CITY CRIMINAL COURT ACT

§ 101. Courts to be held daily in each district.

Except as otherwise provided in this Section, . . . each City Magistrate's Court shall be open every day at nine o'clock in the morning, and shall not be closed before four o'clock in the afternoon. . . .

§ 552. Offenses not bailable.

The defendant cannot be admitted to bail either before or after indictment except by a justice of the Supreme Court . . . when the defendant is charged

1. • • •

2. • • •

3. With a felony . . .

§ 552-a. Identification prior to bail.

No person charged with a felony . . . shall be admitted to bail until his fingerprints shall be taken to ascertain whether he has previously been convicted of crime. . . . Nor shall he be entitled to bail until his previous record, if any, shall be submitted to the judge . . . empowered to admit to bail.

§ 109. Night Courts; separate court for women.

. . . All persons who were arrested after the day courts are closed, or at an hour too late to be brought to a day

court, for offenses other than felonies . . . must be brought to the said night courts and such night courts shall have jurisdiction to hear, try and determine all cases coming within the summary jurisdiction of a city Magistrate . . .

Criminal Procedure—Crimes—Representation

Memorandum relating to this chapter, see p. A-321

CHAPTER 878

An Act to amend the code of criminal procedure and the county law, in relation to providing counsel to persons charged with a crime who are financially unable to obtain counsel and repealing sections one hundred eighty-eight, one hundred eighty-nine and three hundred eight of the code of criminal procedure.

Approved July 16, 1965, effective December 1, 1965.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The county law is hereby amended by inserting therein a new article, to be article eighteen-B, to read as follows:

ARTICLE 18-B

REPRESENTATION OF PERSONS ACCUSED OF CRIME

Section

722. Plan for representation.

Appendix A—Constitutional and Statutory Provisions Mentioned

722–a. Definition of crime.

722–b. Compensation and reimbursement for representation.

722–c. Services other than counsel.

722–d. Duration of assignment.

722–e. Expenses.

§ 722. Plan for representation

The board of supervisors of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county by December first, nineteen hundred sixty-five a plan for providing counsel to persons charged with a crime, who are financially unable to obtain counsel. Each plan shall also provide for investigative, expert and other services necessary for an adequate defense. The plan shall conform to one of the following:

1. Representation by a public defender appointed pursuant to county law article eighteen-A.

2. Representation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation to persons charged with a crime within the city or county who are financially unable to obtain counsel.

3. Representation by counsel furnished pursuant to a plan of a bar association in each county whereby the services of private counsel are rotated and coordinated by an ad-

ministrator. Any plan of a bar association must receive the approval of the judicial conference before the plan is placed in operation.

4. Representation according to a plan containing a combination of any of the foregoing.

Any judge, justice or magistrate in assigning counsel pursuant to sections one hundred eighty-eight, three hundred eight and six hundred ninety-nine of the code of criminal procedure shall assign counsel furnished in accordance with a plan conforming to the requirements of this section

§ 722-a. Definition of crime

For the purposes of this article, the term "crime" shall mean a felony, misdemeanor, or the breach of any law of this state or of any law, local law or ordinance of a political subdivision of this state, other than one that defines a "traffic infraction," for which a sentence to a term of imprisonment is authorized upon conviction thereof.

§ 722-b. Compensation and reimbursement for representation

All counsel assigned in accordance with a plan of a bar association conforming to the requirements of section seven hundred twenty-two whereby the services of private counsel are rotated and coordinated by an administrator shall at the conclusion of the representation receive compensation at a rate not exceeding fifteen dollars per hour for time expended in court or before a magistrate, judge or justice, and ten dollars per hour for time reasonably expended out of

court, and shall receive reimbursement for expenses reasonably incurred. Where a defendant is charged with a crime punishable by death or where a defendant under eighteen years of age at the time of the commission of a crime indicted for a crime which, if committed by an adult, may be punishable by death, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. Where a defendant is charged with one or more other felonies, compensation shall not exceed five hundred dollars. Where a defendant is charged with one or more misdemeanors, compensation shall not exceed three hundred dollars. For representation in an appellate court on an appeal from a judgment of death or on an appeal as of right from a judgment of life imprisonment, imposed in accordance with section ten hundred forty-five or section ten hundred forty-five-a of the penal law, compensation shall not exceed one thousand five hundred dollars where one counsel has been assigned, and shall not exceed two thousand dollars where two or more counsel have been assigned. For representation in an appellate court on an appeal from a judgment of conviction for one or more other felonies, compensation shall not exceed five hundred dollars. For representation in an appellate court on an appeal from a judgment of conviction for one or more misdemeanors, compensation shall not exceed three hundred dollars.

For representation on an appeal, compensation and reimbursement shall be fixed by the appellate court. For all other representation, compensation and reimbursement

shall be fixed by the court where judgment of conviction or acquittal or order of dismissal was entered. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided.

§ 722-c. Services other than counsel

Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant is financialy unable to obtain them, the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensa-

tion applied for or received in the same case from any other source.

§ 722-d. Duration of assignment

Whenever it appears that the defendant is financially able to obtain counsel or to make partial payment for the representation or other services, counsel may report this fact to the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the public defender, private legal aid bureau or society, private attorney, or otherwise.

§ 722-e. Expenses

All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes.

APPENDIX B

Decision of Sobel, *J.*

(Peo. v. Hernandez, et al.)

SUPREME COURT

KINGS COUNTY

CRIMINAL TERM, PART V

Sobel, J.

Dated: December 28, 1965

THE PEOPLE OF THE STATE OF NEW YORK

vs.

ROLLIE HERNANDEZ and HARRY J. KING

Defendants are charged by indictment with manslaughter first degree and assault second degree.

They have moved to suppress, as involuntary, confessions made by them, in each case orally to the police and in writing (Q & A) to the district attorney.

A hearing has been held (Minutes of 9/22 and 9/23, pp. 1 to 199). In addition to the defendants an accomplice Stokes (age 15) testified.

On the issue of the use of physical force and overt threats of such force, I find in favor of the defendants and against the police officers. I find the testimony of the defendants credible and under the circumstances the testimony of the police officers not believable.

Under the "inherently coercive" rule (*Ashcroft* v. *Tennessee,* 322 U.S. 143; *Haley* v. *Ohio,* 332 U.S. 596; *Payne*

v. *Arkansas,* 356 U.S. 560; *Jackson* v. *Denno* [dissent of Justice Black], 378 U.S. 368) the conduct of the police is deemed inherently coercive and the confessions involuntary as a matter of law.

The confessions in my opinion would also be involuntary measured by the "totality of circumstances test" (*Fikes* v. *Alabama,* 352 U.S. 191; *Stein* v. *New York,* 346 U.S. 156). Both defendants were 17 years of age. For an appreciable period of time both defendants continued to deny their involvement in the crime. (The defendant King reasserted his denial to the district attorney during the Q & A questioning). The total duration of questioning, although a disputed issue, was in any event I find beyond acceptable limits. Both defendants were mentally subnormal. Deception was used by the police since neither defendant was told that the investigation was of a homicide, they were led to believe that only an assault was involved.

The defendant Hernandez was unlawfully arrested—without probable cause. I find also that he requested that his mother be called—the police advised him that the 'phone was out of order.

Neither defendant was advised of his right to silence or to the assistance of counsel.

Taken together, all of these circumstances with respect to each defendant exceeded the allowable limits (*Fikes* v. *Alabama, supra*).

* * * * *

Since much of the "external" evidence was not admissible at the hearing, I make no mention of the several

factors which tend to establish that the confessions were untrue.

But also "internally" the confessions are untrue since they do not "match" the crime in fact committed by someone.

In this regard we are, of course, cautioned by the cases, that a finding of "voluntariness" must not be influenced by the irrelevant factors that "externally" or "internally" the confessions appear to be truthworthy.

But common sense would require that the reverse situation—i.e., where the confession "externally" or "internally" appears to be false, should be relevant or "voluntariness." A false confession is much more likely to be the product of coercion than one which is true. But in view of the state of the record at the hearing, I make no finding of fact or law on trustworthiness.

* * * * *

I find solely on the issue of police-accused credibility in favor of the defendants. The People have thus failed to establish voluntariness by any degree of proof.

I find that the defendants' rights under the Fifth and Fourteenth Amendments have been violated. The confessions are suppressed.

Submit order.

SOBEL
J.S.C.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions.[1] A wealth of scholarly material has been written tracing its ramifications and underpinnings.[2] Police and prose-

[1] Compare *United States* v. *Childress*, 347 F. 2d 448 (C. A. 7th Cir. 1965) with *Collins* v. *Beto*, 348 F. 2d 823 (C. A. 5th Cir. 1965). Compare *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, 42 Cal. Rptr. 169 (1964) with *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33 (1964).

[2] See, *e. g.*, Enker and Elsen, Counsel for the Suspect: *Massiah* v. *United States* and *Escobedo* v. *Illinois*, 49 Minn. L. Rev. 47 (1964); Herman, The Supreme Court and Restrictions on Police Interrogations, 25 Ohio St. L. J. 449 (1964); Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965); Dowling, Escobedo and

cutor have speculated on its range and desirability.[2] We granted certiorari in these cases, 382 U. S. 924, 925, 937, in order further to explore some facets of the problems, thus exposed, of applying the privilege against self-incrimination to in-custody interrogation, and to give

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Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure, 56 J. Crim. L., C. & P. S. 156 (1965).

The complex problems also prompted discussions by jurists. Compare Baselon, Law, Morality and Civil Liberties, 12 U. C. L. A. L. Rev. 13 (1964), with Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929 (1965).

[2] For example, the Los Angeles Police Chief stated that "If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!" Parker, 40 L. A. Bar. Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that "[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement." L. A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of *Escobedo*: "What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite." N. Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that "Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain." Quoted in Herman, *supra*, n. 2, at 500, n. 270. Other views on the subject in general are collected in Weisberg, Police Interrogation of Arrested Persons: A Skeptical View, 52 J. Crim. L., C. & P. S., 21 (1961).

concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel"—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come and . . . designed to approach immortality as nearly as human institutions can approach it," *Cohens* v. *Virginia*, 6 Wheat. 264, 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

> "The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the

questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evidenced in many of these earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the inequities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment." *Brown* v. *Walker*, 161 U. S. 591, 596–597 (1896).

In stating the obligation of the judiciary to apply these constitutional rights, this Court declared in *Weems* v. *United States*, 217 U. S. 349, 373 (1910):

". . . our contemplation cannot be only what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in *Escobedo*, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of *Escobedo* today.

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.[4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

[4] This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused.

process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I.

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody and deprived of his freedom of action. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time.[4]

[4] See, for example, IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931)

In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions.[6] The 1961 Commission on Civil Rights found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep., Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. *People* v. *Portelli*, 15 N. Y. 2d 235, 205 N. E. 2d 857, 257 N. Y. S. 2d 931 (1965).[7]

[Wickersham Report]; Booth, Confessions and Methods Employed in Procuring Them, 4 So. Calif. L. Rev. 83 (1930); Kauper, Judicial Examination of the Accused—A Remedy for the Third Degree, 30 Mich L. Rev. 1224 (1932). It is significant that instances of third-degree treatment of prisoners almost invariably took place during the period between arrest and preliminary examination. Wickersham Report, at 169; Hall, The Law of Arrest in Relation to Contemporary Social Problems, 3 U. Chi. L. Rev. 345, 357 (1936). See also Foote, Law and Police Practice: Safeguards in the Law of Arrest, 52 Nw. U. L. Rev. 16 (1957).

[6] *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *Canty* v. *Alabama*, 309 U. S. 629 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Vernon* v. *Alabama*, 313 U. S. 547 (1941); *Ward* v. *Texas*, 316 U. S. 547 (1942); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Leyra* v. *Denno*, 347 U. S. 556 (1954). See also *Williams* v. *United States*, 341 U. S. 97 (1951).

[7] In addition, see *People* v. *Wakat*, 415 Ill. 610, 114 N. E. 2d 706 (1953); *Wakat* v. *Harlib*, 253 F. 2d 59 (C. A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); *Kier* v. *State*, 213 Md. 556, 132 A. 2d 494 (1957) (police doctor told accused, who was

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:

> "To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey): 'It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means.' Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short cut and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you

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strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); *Bruner* v. *People*, 113 Col. 194, 156 P. 2d 111 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); *People* v. *Matlock*, 51 Cal. 2d 682, 336 P. 2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Pott, The Preliminary Examination and "The Third Degree," 2 Baylor L. Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub. L. 25 (1965).

> are not so likely to use your wits.' We agree with the conclusion expressed in the report, that 'The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of justice is held by the public.'" IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement (1931), 5.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "Since *Chambers* v. *Florida*, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960). Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics.[8] These

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[8] The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator (1952), 97–115. Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody (1965), 244–437, 490–521; LaFave, Detention for Investigation by the Police: An Analysis of Current Practices, 1962 Wash. U. L. Q. 331; Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif L. Rev. 11 (1962); Sterling, *supra*, n. 7, at 47–65.

texts are used by law enforcement agencies themselves as guides.[9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is *privacy*—being alone with the person under interrogation." [10] The efficacy of this tactic has been explained as follows:

> "If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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[9] The methods described in Inbau and Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed. 1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1959), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[10] Inbau and Reid, *supra*, at 1.

more reluctant to tell of his indiscretions of criminal behavior within the walls of his own home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law." [11]

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than to court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited attraction to women. The officers are instructed to minimize the moral seriousness of the offense,[12] to cast blame on the victim or on society.[13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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[11] O'Hara, *supra*, at 99.

[12] Inbau and Reid, *supra*, at 34–43, 87. For example, in *Leyra* v. *Denno*, 347 U. S. 556 (195.), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," *id.*, at 562, and again, "We know that morally you were just in anger. Morally, you are not to be condemned," *id.*, at 582.

[13] Inbau and Reid, *supra*, at 43–55.

One writer describes the efficacy of these characteristics in this manner:

> "In the preceding paragraphs emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. This method should be used only when the guilt of the subject appears highly probable." [14]

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge-killing, for example, the interrogator may say:

> "Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him and that's why you carried a gun—for your own protection. You knew him for what he was, no good. Then when you met him he probably started using foul, abusive language and he gave some indi-

[14] O'Hara, *supra*, at 112.

cation that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe?" [15]

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that "Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial." [16]

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly" or the "Mutt and Jeff" act:

". . . In this technique, two agents are employed, Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room." [17]

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[15] Inbau and Reid, *supra*, at 40.

[16] *Ibid.*

[17] O'Hara, *supra*, at 104, Inbau and Reid, *supra*, at 58–59. See *Spano* v. *New York*, 360 U. S. 315 (1959). A variant on the tech-

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. "The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party." [18] Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

> "The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations." [19]

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. "This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent im-

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nique of creating hostility is one of engendering fear. This is perhaps best described by the prosecuting attorney in *Malinski* v. *New York*, 324 U. S. 401, 407 (1945): "Why all this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology—let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[18] O'Hara, *supra*, at 105–106.

[19] *Id.*, at 106.

presses the subject with the apparent fairness of his interrogator." [20] After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

> "Joe, you have a right to remain silent. That's your privilege and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over." [21]

Few will persist in their initial refusals to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

> "[T]he interrogator should respond by suggesting the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.'" [22]

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[20] Inbau and Reid, *supra*, at 111.

[21] *Ibid.*

[22] Inbau and Reid, *supra*, at 112.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired object may be obtained." [23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.[24]

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[23] Inbau and Reid, Lie Detection and Criminal Interrogation (3d ed. 1953), 185.

[24] Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying: "Call it what you want—brain-washing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten." N. Y. Times, Jan. 28, 1965, p. 1, col. 5. In two other instances, similar events had occurred. N. Y. Times, Oct. 20, 1964, p. 22, col. 1; N. Y. Times, Aug. 24, 1965, p. 1, col. 1. In general, see Borchard, Convicting the Innocent (1932); Frank and Frank, Not Guilty (1957).

This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our *Escobedo* decision. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," *id.*, at 307–310. The defendant in *Lynumn* v. *Illinois*, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court similarly reversed the conviction of a defendant in *Haynes* v. *Washington*, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney.[25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.

In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda* v. *Arizona*, the police arrested the defendant and took him to a special interrogation room where they secured a confession. In No. 760, *Vignera* v. *New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover* v. *United States*, the defendant was

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[25] In the fourth confession case decided by the Court in the 1963 Term, *Fay* v. *Noia*, 372 U. S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his co-defendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See *United States* v. *Murphy*, 222 F. 2d 698 (C. A. 2d Cir., 1955) (Frank, J.); *People* v. *Bonino*, 1 N. Y. 2d 752, 135 N. E. 2d 51 (1956).

handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California* v. *Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patented psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity.[26] The current practice of incom-

[26] The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Pro-

municado interrogation is at odds with one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II.

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.[27] Per-

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fessor Sutherland's recent article, Crime and Confession, 79 Harv. L. Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[27] Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, ¶ 6, 3 Yale Judaica Series 52–53. See also Lamm, The Fifth Amendment and Its Equivalent in the Halakha, 5 Judaism 53 (Winter 1956).

haps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How. St. Tr. 1315 (1637–1645). He resisted the oath and declaimed the proceedings, stating:

> "Another fundamental right I then contended for, was, that no man's conscience ought to be racked by oaths imposed, to answer to questions concerning himself in matters criminal, or pretended to be so." Heller and Davies, The Leveller Tracts 1647–1653 (1944), 454.

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England.[28] These sentiments worked their way over to the Colonies and were implanted after great struggle into the Bill of Rights.[29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States,* 116 U. S. 616, 635 (1886). The privilege was elevated to constitutional status and has always been "as broad as the mischief

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[28] See Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 9–11 (1949); 8 Wigmore, Evidence (McNaughton rev., 1961), 289–295. See also Lowell, The Judicial Use of Torture, 11 Harv. L. Rev. 220, 290 (1897).

[29] See Pittman, The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America, 21 Va. L. Rev. 763 (1935); *Ullmann* v. *United States,* 350 U. S. 422, 445–449 (1956) (DOUGLAS, J., dissenting).

against which it seeks to guard." *Counselman* v. *Hitchcock*, 142 U. S. 547, 562 (1892). We cannot depart from this noble heritage.

Thus we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." *United States* v. *Grunewald*, 233 F. 2d 556, 579, 581–582 (Frank, J., dissenting), rev'd, 353 U. S. 391 (1957). We have recently noted that the privilege against self-incrimination—the essential mainstay of our adversary system—is founded on a complex of values, *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 55–57, n. 5 (1964); *Tehan* v. *Shott*, 382 U. S. 406, 414–415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317, to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. *Chambers* v. *Florida*, 309 U. S. 227, 235–238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interroga-

tion. In this Court, the privilege has consistently been accorded a liberal construction. *Albertson* v. *SACB*, 382 U. S. 70, 81 (1965); *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951); *Arndstein* v. *McCarthy*, 254 U. S. 71, 72–73 (1920); *Counselman* v. *Hitchock*, 142 U. S. 547, 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.[39]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), this Court held:

> "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.' "

In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

> "Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

[39] Compare *Brown* v. *Walker*, 161 U. S. 596 (1896); *Quinn* v. *United States*, 349 U. S. 155 (1955).

would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that in order to render a statement admissible the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when but for the improper influences he would have remained silent . . . ." 168 U. S., at 549. And see, *id.*, at 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan* v. *United States*, 266 U. S. 1. He stated:

> "In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram* v. *United States*, 168 U. S. 532." 266 U. S., at 14–15.

In addition to the expansive historical development of the privilege and the sound policies which have nurtured

its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover* v. *United States*, stating: "We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law-enforcement officer." [31]

Because of the adoption by Congress of Rule 5 (a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb* v. *United States*, 318 U. S. 332 (1943), and *Mallory* v. *United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U. S., at 343–344, and in *Mallory*, 354 U. S., at 455–456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself.[32]

Our decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the

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[31] Brief for the United States, p. 28. To the same effect, see Brief for the United States, pp. 40–49, n. 44, *Anderson* v. *United States*, 318 U. S. 350 (1943); Brief for the United States, pp. 17–18, *McNabb* v. *United States*, 318 U. S. 332 (1943).

[32] Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally, Hogan and Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo. L. J. 1 (1958).

privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffin* v. *California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent—that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U. S., at 7–8.[33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from

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[33] The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961); *Wan* v. *United States*, 266 U. S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, *e. g.*, *Malinski* v. *New York*, 324 U. S. 401, 404 (1945); *Bram* v. *United States*, 168 U. S. 532, 540–542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, *Jackson* v. *Denno*, 378 U. S. 368 (1964); *United States* v. *Carignan*, 342 U. S. 36, 38 (1951); see also *Wilson* v. *United States*, 162 U. S. 613, 624 (1896). Appellate review is exacting, see *Haynes* v. *Washington*, 373 U. S. 503 (1963); *Blackburn* v. *Alabama*, 361 U. S. 199 (1960). Whether his conviction was in a federal or state court, the defendant may secure a post-conviction hearing based on the alleged involuntary character of his confession, provided he meets the procedural requirements, *Fay* v. *Noia*, 372 U. S. 391 (1963); *Townsend* v. *Sain*, 372 U. S. 293 (1963). In addition, see *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964).

making a free and rational choice."[34] The implications of this proposition were elaborated in our decision in *Escobedo* v. *Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U. S., at 483, 485, 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.

A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U. S., at 481, 488, 491.[35] This heightened his dilemma, and

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[34] See *Lisenba* v. *California*, 314 U. S. 219, 241 (1941); *Ashcraft* v. *Tennessee*, 322 U. S. 143 (1944); *Malinski* v. *New York*, 324 U. S. 401 (1945); *Spano* v. *New York*, 360 U. S. 315 (1959); *Lynumn* v. *Illinois*, 372 U. S. 528 (1963); *Haynes* v. *Washington*, 373 U. S. 503 (1963).

[35] The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its

made his later statements the product of this compulsion. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege—to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pre-trial privilege, noted in many of the Court's prior decisions: the protection of rights at trial.[38] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the fact-finding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police." *Mapp* v. *Ohio*, 367 U. S. 643, 685 (1961) (HARLAN, J., dissenting). Cf. *Pointer* v. *Texas*, 380 U. S. 400 (1965).

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wake. See *People* v. *Donovan*, 13 N. Y. 2d 148, 193 N. E. 2d 628, 243 N. Y. S. 2d 841 (1964) (Fuld, J.).

[38] *In re Groban*, 352 U. S. 330, 340–352 (1957) (BLACK, J., dissenting); Note, 73 Yale L. J. 1000, 1048–1051 (1964); Comment, 31 U. Chi. L. Rev. 313, 320 (1964) and authorities cited.

III.

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and

unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury.[37] Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on infor-

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[37] See p. 16, *supra*. Lord Devlin has commented:

"It is probable that even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worst for you if you do not." Devlin, The Criminal Prosecution in England (1958), 32.

In accord with this decision, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. *Griffin* v. *California*, 380 U. S. 609 (1965); *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964); Comment, 31 U. Chi. L. Rev. 556 (1964); Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 1041–1044 (1966). See also *Bram* v. *United States*, 168 U. S. 532, 562 (1897).

mation as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; [38] a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere

[38] Cf. *Betts* v. *Brady*, 316 U. S. 455 (1942), and the recurrent inquiry into special circumstances it necessitated. See generally, Kamisar, *Betts* v. *Brady* Twenty Years Later: The Right to Counsel and Due Process Values, 61 Mich. L. Rev. 219 (1962).

warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as *amicus curiae*, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial. See *Crooker* v. *California*, 357 U. S. 433, 443–448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request

may be the person who most needs counsel. As the California Supreme Court has aptly put it:

> "Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status has fortuitously prompted him to make it." *People* v. *Dorado*, 62 Cal. 2d 338, 351, 398 P. 2d 361, 369–370, 42 Cal. Rptr. 169, 177–178 (1965) (Tobriner, J.).

In *Carnley* v. *Cochran*, 369 U. S. 506, 513 (1962), we stated: "[I]t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation.[39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of

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[39] See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 480 (1964).

circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel.[40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice.[41] Denial

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[40] Estimates of 50–90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn. L. Rev. 737, 738–739 (1961); Birzon, Kasanof and Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buff. L. Rev. 428, 433 (1965).

[41] See Kamisar, Equal Justice in the Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time (1965), 64–81. As was stated in the Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963), p. 9:

"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While govern-

of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Douglas* v. *California*, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present.[42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.[43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any man-

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ment may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[42] Cf. *United States ex rel. Brown* v. *Fay*, 242 F. Supp. 273, 277 (D. C. S. D. N. Y. 1965); *People* v. *Witenski*, 15 N. Y. 2d 392, 207 N. E. 2d 358, 259 N. Y. S. 2d 413 (1965).

[43] While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

ner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[44] At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may do so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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[44] If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. A statement we made in *Carnley* v. *Cochran*, 369 U. S. 506, 516 (1962), is applicable here:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also *Glasser* v. *United States*, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives

some information on his own prior to invoking his right to remain silent when interrogated.[45]

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Sim-

[45] Although this Court held in *Rogers* v. *United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial fact-finding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

ilarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement. In *Escobedo* itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See *Escobedo* v. *Illinois*, 378 U. S. 478, 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of

responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime,[47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privi-

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[46] The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect." *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.).

[47] See *People* v. *Dorado*, 62 Cal. 2d 338, 354, 398 P. 2d 361, 371, 42 Cal. Rptr. 169, 179 (1965).

lege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[48]

IV.

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, 240–241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same

[48] In accordance with our holdings today and in *Escobedo* v. *Illinois*, 378 U. S. 478, 492, *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958) are not to be followed.

> rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).[49]

In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his

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[49] In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[50] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956).

client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.[51] Further examples are chronicled in our prior cases. See, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Malinski* v. *New York*, 324 U. S. 401, 402 (1945).[52]

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[51] Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[52] Dealing as we do here with constitutional standards in relation to statements made, the existence of independent corroborating evidence produced at trial is, of course, irrelevant to our decisions. *Haynes* v. *Washington*, 373 U. S. 503, 518–519 (1963); *Lynumn* v.

It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings, with counsel present than without. It can be assumed that in such circumstances a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, *California* v. *Stewart*, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause.[53]

Illinois, 372 U. S. 528, 537–538 (1963); *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961); *Blackburn* v. *Alabama*, 361 U. S. 199, 206 (1960).

[53] See, *e. g.*, Report and Recommendations of the Commissioner's Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being

Over the years the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice and, more recently, that he has a right to free counsel if he is unable to pay.[54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H. R. 11477, S. 2970, S. 3325, and S. 3355 (July 1958), pp. 40, 78.

[54] In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory.

"We can have the Constitution, the best laws in the land, and the most honest reviews by courts—but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually—and without end—be violated . . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative.

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L. Rev. 175, 177–182 (1952).

rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

> "At the oral argument of the above cause, MR. JUSTICE FORTAS asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the Federal Bureau of Investigation and am submitting herewith a statement of the questions and of the answers which we have received.
>
> "'(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?
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> "'The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the *Westover* case at 342 F. 2d 685 (1965), and *Jackson* v. *U. S.*, 337 F. 2d 136 (1964), cert. den. 380 U. S. 985.
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> "'After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warn-

ing to read counsel of his own choice, or anyone else with whom he might wish to speak.

"'(2) When is the warning given?

"'The FBI warning is given to a suspect at the very outset of the interview, as shown in the *Westover* case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the *Jackson* case, also cited above, and in *U. S.* v. *Konigsberg*, 336 F. 2d 844 (1964), cert. den. 379 U. S. 930, 933, but in any event it must precede the interview with the person for a confession or admission of his own guilt.

"'(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?

"'When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, *Shultz* v. *U. S.*, 351 F. 2d 287 (1965). It may be continued, however, as to all matters *other* than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in *Hiram* v. *U. S.*, 354 F. 2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts.

"'A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in *Caldwell* v. *U. S.*, 351 F. 2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private.

"'(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?

"'If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge.'" [55]

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience.[56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure since 1912

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[55] We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[56] Among the crimes within the enforcement jurisdiction of the FBI are kidnaping, 18 U. S. C. § 1201 (1964 ed.), white slavery, 18 U. S. C. §§ 2421–2423 (1964 ed.), bank robbery, 18 U. S. C. § 2113 (1964 ed.), interstate transportation and sale of stolen property, 18 U. S. C. §§ 2311–2317 (1964 ed.), all manner of conspiracies, 18 U. S. C. § 371 (1964 ed.), and violations of civil rights, 18 U. S. C. §§ 241–242 (1964 ed.). See also 18 U. S. C. § 1114 (1964 ed.) (murder of officer or employee of the United States).

under the Judge's Rules is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police.[57]

[57] [1964] Crim. L. Rev. 166–170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

"The caution shall be in the following terms:

" 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'

"When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

. . . . .

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted.

. . . . .

"IV. All written statements made after caution shall be taken in the following manner:

"(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says.

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him, a police officer may offer to write the statement for him . . . .

"(b) Any person writing his own statement shall be allowed to do so without any prompting as distinct from indicating to him what matters are material.

. . . . .

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to

The right of the individual to consult with an attorney during this period is expressly recognized.[58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation.[59] In India, confessions made to police not in the presence of a magistrate have been ex-

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make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."

The prior Rules appear in Devlin, The Criminal Prosecution in England (1958), 137–141.

Despite suggestions of some laxity in enforcement of the Rules and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, *e. g.*, [1964] Crim. L. Rev., at 182; and articles collected in [1960] Crim. L. Rev., at 298–356.

[58] The introduction to the Judge's Rules states in part:

"These Rules do not affect the principles

"(c) That every person at any stage of an investigation should be able to communicate and consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so . . . ." [1964] Crim. L. Rev., at 166–167.

[59] As stated by the Lord Justice General in *Chalmers* v. *H. M. Advocate*, [1954] Sess. Cas. 66, 78 (J. C.):

"The theory of our law is that at the stage of initial investigation the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centred upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, *e. g.*, to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

cluded by rule of evidence since 1872, at a time when it operated under British law.[60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895.[61] Similarly, in our country the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him.[62] Denial of the right to consult counsel during interrogation has also been proscribed by military tribunals.[63] There appears to have been no marked detrimental effect on criminal law enforcement in these jurisdictions as a result of these rules. Conditions of law enforcement in our country are sufficiently similar to permit reference to this experience as assurance that lawlessness will not result from warning an individual of his rights or allowing him to exercise them. Moreover, it is consistent with our legal system that we give at least as much protection to these rights as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution,

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[60] "No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person." Indian Evidence Act, § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India (1962), 553–569. To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting: "[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not to make a confession." *Sarwan Singh* v. *State of Punjab*, 44 All India Rep. 1957, Sup. Ct. 637, 644.

[61] 1 Legislative Enactments of Ceylon (1958), 211.

[62] 10 U. S. C. § 831 (b) (1964 ed.).

[63] *United States* v. *Rose*, 24 Court-Martial Reports 251 (1957); *United States* v. *Gunnels*, 23 Court-Martial Reports 354 (1957).

whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined."[44]

It is also urged upon us that we withhold decision on this issue until state legislative bodies and advisory groups have had an opportunity to deal with these problems by rule making.[45] We have already pointed out that the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation. Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective as those described above in informing accused persons of their right of silence and in affording a continuous opportunity to exercise it. In any event, however, the issues presented are of constitutional dimensions and must be determined by the courts. The admissibility of a statement in the face of a claim that it was obtained in violation of the defendant's constitutional rights is an issue the resolution of which has long since been undertaken by this Court. See *Hopt* v. *Utah*, 110 U. S. 574 (1884). Judicial solutions to problems of constitutional dimension have evolved decade by decade. As courts have been presented with the need to enforce constitutional rights, they have found means of doing so. That was our responsibility when *Escobedo* was before us and it is our

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[44] Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20 (3). See Tope, The Constitution of India (1960), 63–67.

[45] Brief for United States in No. 761, *Westover* v. *United States*, pp. 44–47; Brief for the State of New York as *amicus curiae*, pp. 35–39. See also Brief for the National District Attorneys Association as *amicus curiae*, pp. 23–26.

responsibility today. Where rights secured by the Constitution are involved, there can be no rule making or legislation which would abrogate them.

V.

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. We turn now to these facts to consider the application to these cases of the constitutional principles discussed above. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

No. 759. *Miranda* v. *Arizona.*

On March 13, 1963, petitioner, Ernesto Miranda, was arrested at his home and taken in custody to a Phoenix police station. He was there identified by the complaining witness. The police then took him to "Interrogation Room No. 2" of the detective bureau. There he was questioned by two police officers. The officers admitted at trial that Miranda was not advised that he had a right to have an attorney present.[**] Two hours later, the

[**] Miranda was also convicted in a separate trial on an unrelated robbery charge not presented here for review. A statement introduced at that trial was obtained from Miranda during the same interrogation which resulted in the confession involved here. At the robbery trial, one officer testified that during the interrogation he did not tell Miranda that anything he said would be held against him or that he could consult with an attorney. The other officer stated that they had both told Miranda that anything he said would be used against him and that he was not required by law to tell them anything.

officers emerged from the interrogation room with a written confession signed by Miranda. At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and "with full knowledge of my legal rights, understanding any statement I make may be used against me." [67]

At his trial before a jury, the written confession was admitted into evidence over the objection of defense counsel, and the officers testified to the prior oral confession made by Miranda during the interrogation. Miranda was found guilty of kidnapping and rape. He was sentenced to 20 to 30 years' imprisonment on each count, the sentences to run concurrently. On appeal, the Supreme Court of Arizona held that Miranda's constitutional rights were not violated in obtaining the confession and affirmed the conviction. 98 Ariz. 18, 401 P. 2d 721. In reaching its decision, the court emphasized heavily the fact that Miranda did not specifically request counsel.

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. *Haynes* v. *Washington*, 373 U. S.

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[67] One of the officers testified that he read this paragraph to Miranda. Apparently, however, he did not do so until after Miranda had confessed orally.

503, 512–513 (1963); *Haley* v. *Ohio*, 332 U. S. 596, 601 (1948) (opinion of MR. JUSTICE DOUGLAS).

No. 760. *Vignera* v. *New York.*

Petitioner, Michael Vignera, was picked up by New York police on October 14, 1960, in connection with the robbery three days earlier of a Brooklyn dress shop. They took him to the 17th Detective Squad headquarters in Manhattan. Sometime thereafter he was taken to the 66th Detective Squad. There a detective questioned Vignera with respect to the robbery. Vignera orally admitted the robbery to the detective. The detective was asked on cross-examination at trial by defense counsel whether Vignera was warned of his right to counsel before being interrogated. The prosecution objected to the question and the trial judge sustained the objection. Thus, the defense was precluded from making any showing that warnings had not been given. While at the 66th Detective Squad, Vignera was identified by the store owner and a saleslady as the man who robbed the dress shop. At about 3:00 p. m. he was formally arrested. The police then transported him to still another station, the 70th Precinct in Brooklyn, "for detention." At 11:00 p. m. Vignera was questioned by an assistant district attorney in the presence of a hearing reporter who transcribed the questions and Vignera's answers. This verbatim account of these proceedings contains no statement of any warnings given by the assistant district attorney. At Vignera's trial on a charge of first degree robbery, the detective testified as to the oral confession. The transcription of the statement taken was also introduced in evidence. At the conclusion of the testimony, the trial judge charged the jury in part as follows:

> "The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what

I said? I am telling you what the law of the State of New York is."

Vignera was found guilty of first degree robbery. He was subsequently adjudged a third-felony offender and sentenced to 30 to 60 years' imprisonment.[68] The conviction was affirmed without opinion by the Appellate Division, Second Department, 21 A. D. 2d 752, 252 N. Y. S. 2d 19, and by the Court of Appeals, also without opinion, 15 N. Y. 2d 970, 207 N. E. 2d 527, 259 N. Y. S. 2d 857, remittitur amended, 16 N. Y. 2d 614, 209 N. E. 2d 110, 261 N. Y. S. 2d 65. In argument to the Court of Appeals, the State contended that Vignera had no constitutional right to be advised of his right to counsel or his privilege against self-incrimination.

We reverse. The foregoing indicates that Vignera was not warned of any of his rights before the questioning by the detective and by the assistant district attorney. No other steps were taken to protect these rights. Thus he was not effectively apprised of his Fifth Amendment privilege or of his right to have counsel present and his statements are inadmissible.

No. 761. *Westover* v. *United States.*

At approximately 9:45 p. m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and at about 11:45 p. m. he was booked. Kansas City police interrogated West-

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[68] Vignera thereafter successfully attacked the validity of one of the prior convictions, *Vignera* v. *Wilkins*, Civ. 9901 (D. C. W. D. N. Y. Dec. 31, 1961) (unreported), but was then resentenced as a second-felony offender to the same term of imprisonment as the original sentence. R. 31–33.

over on the night of his arrest. He denied any knowledge of criminal activities. The next day local officers interrogated him again throughout the morning. Shortly before noon they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and a bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

Westover was tried by a jury in federal court and convicted of the California robberies. His statements were introduced at trial. He was sentenced to 15 years' imprisonment on each count, the sentences to run consecutively. On appeal, the conviction was affirmed by the Court of Appeals for the Ninth Circuit. 342 F. 2d 684.

We reverse. On the facts of this case we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement.[89] At the

[89] The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the

time the FBI agents began questioning Westover, he had been in custody for over 14 hours and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation nor is there any evidence of an articulated waiver of rights after the FBI commenced their interrogation. The record simply shows that the defendant did in fact confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view the warnings came at the end of the interrogation process. In these circumstances an intelligent waiver of constitutional rights cannot be assumed.

We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings. Thus, in obtaining a confession from West-

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objection available, the failure to object at trial does not constitute a waiver of the claim. See, *e. g., United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12, 16 (C. A. 2d Cir. 1964); aff'd, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc.* v. *United States*, 318 U. S. 73, 78 (1943).

over the federal authorities were the beneficiaries of the pressure applied by the local in-custody interrogation. In these circumstances the giving of warnings alone was not sufficient to protect the privilege.

No. 584. *California* v. *Stewart.*

In the course of investigating a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant, repondent, Roy Allen Stewart, was pointed out to Los Angeles police as the endorser of dividend checks taken in one of the robberies. At about 7:15 p. m., January 31, 1963, police officers went to Stewart's house and arrested him. One of the officers asked Stewart if they could search the house, to which he replied, "Go ahead." The search turned up various items taken from the five robbery victims. At the time of Stewart's arrest, police also arrested Stewart's wife and three other persons who were visiting him. These four were jailed along with Stewart and were interrogated. Stewart was taken to the University Station of the Los Angeles Police Department where he was placed in a cell. During the next five days, police interrogated Stewart on nine different occasions. Except during the first interrogation session, when he was confronted with an accusing witness, Stewart was isolated with his interrogators.

During the ninth interrogation session, Stewart admitted that he had robbed the deceased and stated that he had not meant to hurt her. Police then brought Stewart before a magistrate for the first time. Since there was no evidence to connect them with any crime, the police then released the other four persons arrested with him.

Nothing in the record specifically indicates whether Stewart was or was not advised of his right to remain silent or his right to counsel. In a number of instances,

however, the interrogating officers were asked to recount everything that was said during the interrogations. None indicated that Stewart was ever advised of his rights.

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal. 2d 571, 400 P. 2d 97, 43 Cal. Rptr. 201. It held that under this Court's decision in *Escobedo*, Stewart should have been advised of his right to remain silent and of his right to counsel and that it would not presume in the face of a silent record that the police advised Stewart of his rights.[10]

We affirm.[11] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been em-

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[10] Because of this disposition of the case, the California Supreme Court did not reach the claims that the confession was coerced by police threats to hold his ailing wife in custody until he confessed, that there was no hearing as required by *Jackson* v. *Denno*, 378 U. S. 368 (1964), and that the trial judge gave an instruction condemned by the California Supreme Court's decision in *People* v. *Morse*, 60 Cal. 2d 631, 388 P. 2d 33, 36 Cal. Rptr. 201 (1964).

[11] After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U. S. C. § 1257 (3) (1964 ed.), we denied the motion. 383 U. S. 903.

ployed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

Therefore, in accordance with the foregoing, the judgments of the Supreme Court of Arizona in No. 759, of the New York Court of Appeals in No. 760, and of the Court of Appeals for the Ninth Circuit in No. 761 are reversed. The judgment of the Supreme Court of California in No. 584 is affirmed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

759	Ernesto A. Miranda, Petitioner, *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
760	Michael Vignera, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
761	Carl Calvin Westover, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
584	State of California, Petitioner, *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE CLARK, dissenting in Nos. 759, 760, and 761, and concurring in result in No. 584.

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I agree with the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [1] are, as I read them, merely writings in this field by pro-

[1] *E. g.*, Inbau and Reid, Criminal Interrogation and Confessions (1962); O'Hara, Fundamentals of Criminal Interrogation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

fessors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court are rare exceptions to the thousands of cases that appear every year in the law reports.[2] The police agencies—all the way from municipal and state forces to the federal bureaus—are responsible for law enforcement and public safety in this country. I am proud of their efforts, which in my view are not fairly characterized by the Court's opinion.

I.

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. —. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo* v. *Illinois*, 378 U. S. 478, 490–491 (1964). Now, the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, that counsel will be furnished him. When at any point during an interrogation the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of

[2] As developed by my Brother HARLAN, *post*, pp. —, —, such cases, with the exception of the long-discredited decision in *Bram* v. *United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient.[3] Since there is at this time a paucity of information and an almost total lack of empirical knowledge on the practical operation of requirements, truly comparable to those announced by the majority, I would be more restrained lest we go too far too fast.

II.

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforce-

[3] The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As my Brother HARLAN points out, *post*, pp. —, —, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. —, —, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover* v. *United States*, 342 F. 2d 684, 685 (1965) ("right to consult counsel"); *Jackson* v. *United States*, 337 F. 2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that whenever the suspect "decides that he wishes to consult counsel before making a statement, the interview is terminated at that point . . . . When counsel appears in person, he is permitted to confer with his client in private." This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states: "[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel *if* they are unable to pay, and the availability of such counsel from the Judge." So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself and that he may have counsel appointed only when brought before the judge or at trial—but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

ment." *Haynes* v. *Washington*, 373 U. S. 503, 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding and where the light of our past cases, from *Hopt* v. *Utah*, 110 U. S. 574, (1884), down to *Haynes* v. *Washington*, *supra*, are to the contrary. Indeed, even in *Escobedo* the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel—absent a waiver—during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker* v. *California*, 357 U. S. 433 (1958) and *Cicenia* v. *Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

The rule prior to today—as Mr. Justice Goldberg, the author of the Court's opinion in *Escobedo*, stated it in *Haynes* v. *Washington*—depended upon "a totality of circumstances evidencing an involuntary . . . admission of guilt." 373 U. S., at 514. And he concluded:

> "Of course, detection and solution of crime is, at best, a difficult and arduous task requiring determination and persistence on the part of all responsible officers charged with the duty of law enforcement. And, certainly, we do not mean to suggest that all interrogation of witnesses and suspects is impermissible. Such questioning is undoubtedly an essential tool in effective law enforcement. The line between proper and permissible police conduct and techniques and methods offensive to due process is, at best, a difficult one to draw, particularly in cases such

as this where it is necessary to make fine judgments as to the effect of psychologically coercive pressures and inducement on the mind and will of an accused . . . . We are here impelled to the conclusion, from all of the facts presented, that the bounds of due process have been exceeded." *Id.*, at 515.

III.

I would continue to follow that rule. Under the "totality of circumstances" rule of which my Brother Goldberg spoke in *Haynes*, I would consider in each case whether the police officer prior to custodial interrogation added the warning that the suspect might have counsel present at the interrogation and, further, that a court would appoint one at his request if he was too poor to employ counsel. In the absence of warnings, the burden would be on the State to prove that counsel was knowingly and intelligently waived or that in the totality of the circumstances, including the failure to give the necessary warnings, the confession was clearly voluntary.

Rather than employing the arbitrary Fifth Amendment rule[4] which the Court lays down I would follow the more pliable dictates of Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody. In this way we would not be acting in the dark nor in one full sweep changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society. It will be soon enough to go further when we are able to

[4] In my view there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point see the dissenting opinion of my Brother WHITE, *post*, pp. —, —.

appraise with somewhat better accuracy the effect of such a holding.

I would affirm the convictions in *Miranda* v. *Arizona*, No. 759; *Vignera* v. *New York*, No. 760; and *Westover* v. *United States*, No. 761. In each of those cases I find from the circumstances no warrant for reversal. In *California* v. *Stewart*, No. 584, I would dismiss the writ of certiorari for want of a final judgment, 28 U. S. C. § 1257 (3) (1964); but if the merits are to be reached I would affirm on the ground that the State failed to fulfill its burden, in the absence of a showing that appropriate warnings were given, of proving a waiver or a totality of circumstances showing voluntariness. Should there be a retrial, I would leave the State free to attempt to prove these elements.

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

759	Ernesto A. Miranda, Petitioner, *v.* State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
760	Michael Vignera, Petitioner, *v.* State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
761	Carl Calvin Westover, Petitioner, *v.* United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
584	State of California, Petitioner, *v.* Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court's justification seem to me readily apparent now once all sides of the problem are considered.

I. INTRODUCTION.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a four-

fold warning be given to a person in custody before he is questioned: namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.[1]

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may

[1] My discussion in this opinion is directed to the main questions decided by the Court and necessary to its decision; in ignoring some of the collateral points, I do not mean to imply agreement.

on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable if not one-sided appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

II. Constitutional Premises.

It is most fitting to begin an inquiry into the constitutional precedents by surveying the limits on confessions the Court has evolved under the Due Process Clause of the Fourteenth Amendment. This is so because these cases show that there exists a workable and effective means of dealing with confessions in a judicial manner; because the cases are the baseline from which the Court now departs and so serve to measure the actual as opposed to the professed distance it travels; and because examination of them helps reveal how the Court has coasted into its present position.

The earliest confession cases in this Court emerged from federal prosecutions and were settled on a nonconstitutional basis, the Court adopting the common-law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt* v. *Utah*, 110 U. S. 574; *Pierce* v. *United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions.[2] The

[2] The case was *Bram* v. *United States*, 168 U. S. 532 (quoted, *ante*, p. 23). Its historical premises were afterwards disproved by

Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," *Wan* v. *United States*, 266 U. S. 1, 14 (quoted, *ante*, p. 24), and then by and large left federal judges to apply the same standards the Court began to derive in a string of state court cases.

This new line of decisions, testing admissibility by the Due Process Clause, began in 1936 with *Brown* v. *Mississippi*, 297 U. S. 278, and must now embrace somewhat more than 30 full opinions of the Court.[3] While the voluntariness rubric was repeated in many instances, *e. g.*, *Lyons* v. *Oklahoma*, 322 U. S. 596, the Court never pinned it down to a single meaning but on the contrary infused it with a number of different values. To travel quickly over the main themes, there was an initial emphasis on reliability, *e. g.*, *Ward* v. *Texas*, 316 U. S. 547, supplemented by concern over the legality and fairness of the police practices, *e. g.*, *Ashcraft* v. *Tennessee*, 322 U. S. 143, in an "accusatorial" system of law enforcement, *Watts* v. *Indiana*, 338 U. S. 49, 54, and eventually by close attention to the individual's state of mind and capacity for effective choice, *e. g.*, *Gallegos* v. *Colorado*, 370 U. S. 49. The outcome was a continuing re-evaluation

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Wigmore, who concluded "that no assertions could be more unfounded." 3 Wigmore, Evidence § 823, at 250, n. 5 (3d ed. 1940). The Court in *United States* v. *Carignan*, 342 U. S. 36, 41, declined to choose between *Bram* and Wigmore, and *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, cast further doubt on *Bram*. There are, however, several Court opinions which assume in dicta the relevance of the Fifth Amendment privilege to confessions. *Burdeau* v. *McDowell*, 256 U. S. 465, 475; see *Shotwell Mfg. Co.* v. *United States*, 371 U. S. 341, 347. On *Bram* and the federal confession cases generally, see Developments in the Law—Confessions, 79 Harv. L. Rev. 935, 959–961 (1966).

[3] Comment, 31 U. Chi. L. Rev. 313 & n. 1 (1964), states that by the 1963 Term 33 state coerced confession cases had been decided by this Court, apart from *per curiams*. *Spano* v. *New York*, 360 U. S. 315, 321, n. 2, collects 28 cases.

on the facts of each case of *how much* pressure on the suspect was permissible.[4]

Among the criteria often taken into account were threats or imminent danger, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560, physical deprivations such as lack of sleep or food, *e. g.*, *Reck* v. *Pate*, 367 U. S. 433, repeated or extended interrogation, *e. g.*, *Chambers* v. *Florida*, 309 U. S. 227, limits on access to counsel or friends, *Crooker* v. *California*, 357 U. S. 433; *Cicenia* v. *Lagay*, 357 U. S. 504, length and illegality of detention under state law, *e. g.*, *Haynes* v. *Washington*, 373 U. S. 503, and individual weakness or incapacities, *Lynumn* v. *Illinois*, 372 U. S. 528. Apart from direct physical coercion, however, no single default or fixed combination of them guaranteed exclusion, and synopses of the cases would serve little use because the overall gauge has been steadily changing, usually in the direction of restricting admissibility. But to mark just what point had been reached before the Court jumped the rails in *Escobedo* v. *Illinois*, 378 U. S. 478, it is worth capsulizing the then-recent case of *Haynes* v. *Washington*, 373 U. S. 573. There, Haynes had been held some 16 or more hours in violation of state law before signing the disputed confession, had received no warnings of any kind, and despite requests had been refused access to his wife or to counsel, the police indicating that access would be allowed after a confession. Emphasizing especially this last inducement and reject-

[4] Bator & Vorenberg, Arrest, Detention, Interrogation and the Right to Counsel, 66 Col. L. Rev. 62, 73 (1966): "In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice." See Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio St. L. J. 449, 452–458 (1964); Developments, *supra*, n. 2, at 964–984.

ing some contrary indicia of voluntariness, the Court in a 5-to-4 decision held the confession inadmissible.

There are several relevant lessons to be drawn from this constitutional history. The first is that with over 25 years of precedent the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see *Culombe* v. *Connecticut*, 367 U. S. 568, 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts. Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that in practice and from time to time in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty,[5] and the lower courts may often have been yet more tolerant. Of course the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. *Powers* v. *United States*, 223 U. S. 303; *Wilson* v. *United States*, 162 U. S. 613. As recently as *Haynes* v. *Washington*, 373 U. S. 503, 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, *Crooker* v. *California*, 357 U. S. 433, 441.

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[5] See the cases synopsized in Herman, *supra*, n. 4, at 456, nn. 36–39. One not too distant example is *Stroble* v. *California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," *Malloy* v. *Hogan*, 378 U. S. 1, 8, and that "a prisoner is not 'to be made the deluded instrument of his own conviction,'" *Culombe* v. *Connecticut*, 367 U. S. 568, 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed somewhat misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, *e. g.*, *supra*, n. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but in all events one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*. The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed, "the *history* of the

two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents . . . ." 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961). Practice under the two doctrines has also differed in a number of important respects.[6] Even those who would readily enlarge the privilege must concede some linguistic difficulties since the Fifth Amendment in terms proscribes only compelling any person "in any criminal case to be a witness against himself." Cf. Kamisar, Equal Justice in The Gatehouses and Mansions of American Criminal Procedure, in Criminal Justice in Our Time 25–26 (1965).

Though weighty, I do not say these points and similar ones are conclusive, for as the Court reiterates the privilege embodies basic principles always capable of expansion.[7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial rather than inquisitorial values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this indeed is why at present "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general

[6] Among the examples given in 8 Wigmore, Evidence § 2266, at 401 (McNaughton rev. 1961), are these: the privilege applies to any witness, civil or criminal, but the confession rule protects only criminal defendants; the privilege deals only with compulsion, while the confession rule may exclude statements obtained by trick or promise; and where the privilege has been nullified—as by the English Bankruptcy Act—the confession rule may still operate.

[7] Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15–16 (1959).

principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test.[8] It then emerges from a discussion of *Escobedo* that the Fifth Amendment requires for an admissible confession that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See *ante*, pp. 27–28. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment.[9]

The more important premise is that pressure on the suspect must be eliminated though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid *all* pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial

[8] This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in *Malloy* v. *Hogan*, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." *Ante*, p. 25. It is also inconsistent with *Malloy* itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has in recent years been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U. S., at 7.

[9] I lay aside *Escobedo* itself; it contains no reasoning or even general conclusions addressed to the Fifth Amendment and indeed its citation in this regard seems surprising in view of *Escobedo*'s primary reliance on the Sixth Amendment.

of removal of one's case from state to federal court, *Maryland* v. *Soper*, 270 U. S. 9; in refusal of a military commission, *Orloff* v. *Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman* v. *Hurwitz*, 176 F. 2d 210; and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 440–444, n. 17 (McNaughton rev. 1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that short of jail or torture any sanction is permissible in any case; policy and history alike may impose sharp limits. See, *e. g.*, *Griffin* v. *California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, *e. g.*, *United States* v. *Scully*, 225 F. 2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev. 1961). Cf. *Henry* v. *Mississippi*, 379 U. S. 443, 451–452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might of course be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning but that is a different matter entirely. See *infra*, pp. 13–15.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a

knowing and intelligent waiver, the Court cites to *Johnson* v. *Zerbst*, 304 U. S. 458, *ante*, p. 37; appointment of counsel for the indigent suspect is tied to *Gideon* v. *Wainwright*, 372 U. S. 335, and *Douglas* v. *California*, 372 U. S. 353, *ante*, p. 35; the silent-record doctrine is borrowed from *Carnley* v. *Cochran*, 369 U. S. 506, *ante*, p. 37, as is the right to an express offer of counsel, *ante*, p. 33. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases.[10]

The only attempt in this Court to carry the right to counsel into the station house occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than trial itself. See 378 U. S., 485–488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical" yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor but not to himself. This danger shrinks markedly in the police station where indeed the lawyer

[10] Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police-interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 943–948 (1965).

in fulfilling his professional responsibilities of necessity may become an obstacle to truthfinding. See *infra*, n. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as "the domino method of constitutional adjudication . . . wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Friendly, *supra*, n. 10, at 950.

III. Policy Considerations.

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law. Forgoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. *Ante*, p. 41. Rather, precedent reveals that the Fourteenth Amendment in practice has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the sus-

pect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced" is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). Until today, the role of the Constitution has been only to sift out *undue* pressure, not to assure spontaneous confessions.[11]

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.[12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. *Ante*, pp. 10–18.

What the Court largely ignores is that its rules impair if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite

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[11] See *supra*, n. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See *Collins* v. *Beto*, 348 F. 2d 823, 832 (concurring opinion); Bator & Vorenberg, *supra*, n. 4, at 72–73.

[12] The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (*ante*, p. 32) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. *Watts* v. *Indiana*, 338 U. S. 49, 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn. L. Rev. 47, 66–68 (1964).

reasonably been thought worth the price paid for it.[13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. See, *supra*, n. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, see Developments, *supra*, n. 2, at 941–944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. See *infra*, n. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control,[14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

While passing over the costs and risks of its experiment, the Court portrays the evils of normal police questioning in terms which I think are exaggerated. Albeit

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[13] This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and beleaguered by the new heirs. *Ante*, pp. 19–20, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain, however the balance is resolved.

[14] See, *e. g.*, the voluminous citations to congressional committee testimony and other sources collected in *Culombe* v. *Connecticut*, 367 U. S. 568, 578–579 (Frankfurter, J., announcing the Court's judgment and an opinion).

stringently confined by the due process standards interrogation is no doubt often inconvenient and unpleasant for the suspect. However, it is no less so for a man to be arrested and jailed, to have his house searched, or to stand trial in court, yet all this may properly happen to the most innocent given probable cause, a warrant, or an indictment. Society has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law.

This brief statement of the competing considerations seems to me ample proof that the Court's preference is highly debatable at best and therefore not to be read into the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. *Miranda* v. *Arizona* serves best, being neither the hardest nor easiest of the four under the Court's standards.[15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him,

[15] In *Westover*, a seasoned criminal was practically given the Court's full complement of warnings and did not heed them. The *Stewart* case, on the other hand, involves long detention and successive questioning. In *Vignera*, the facts are complicated and the record somewhat incomplete.

starting about 11:30 a. m. Though at first denying his guilt, within a short time Miranda gave a detailed oral confession and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less without any force, threats or promises and—I will assume this though the record is uncertain, *ante*, 53–54 & nn. 66–67—without any effective warnings at all.

Miranda's oral and written confessions are now held inadmissible under the Court's new rules. One is entitled to feel astonished that the Constitution can be read to produce this result. These confessions were obtained during brief, daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness which I seriously doubt is shared by many thinking citizens in this country.[16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although *Escobedo* has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions

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[16] "[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true." *Snyder* v. *Massachusetts*, 291 U. S. 97, 122 (Cardozo, J.).

in point have sought quite narrow interpretations.[17] Of the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today.[18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mapp* v. *Ohio*, 367 U. S. 643, and *Gideon* v. *Wainwright*, 372 U. S. 335. In *Johnson*, which established that appointed counsel

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[17] A narrow reading is given in: *United States* v. *Robinson*, 354 F. 2d 109 (C. A. 2d Cir.); *Davis* v. *North Carolina*, 339 F. 2d 770 (C. A. 4th Cir.); *Edwards* v. *Holman*, 342 F. 2d 679 (C. A. 5th Cir.); *United States ex rel. Townsend* v. *Ogilvie*, 334 F. 2d 837 (C. A. 7th Cir.); *People* v. *Hartgraves*, 31 Ill. 2d 375, 202 N. E. 2d 33; *State* v. *Fox*, 131 N. W. 2d 684 (Iowa); *Rowe* v. *Commonwealth*, 394 S. W. 2d 751 (Ky.); *Parker* v. *Warden*, 203 A. 2d 418 (Md.); *State* v. *Howard*, 383 S. W. 2d 701 (Mo.); *Bean* v. *State*, 398 P. 2d 251 (Nev.); *Hodgson* v. *New Jersey*, 44 N. J. 151, — A. 2d —; *People* v. *Gunner*, 15 N. Y. 2d 226, 205 N. E. 2d 852; *Commonwealth ex rel. Linde* v. *Maroney*, 416 Pa. 331, 206 A. 2d 288; *Browne* v. *State*, 24 Wis. 2d 491, 131 N. W. 2d 169.

An ample reading is given in: *United States ex rel. Russo* v. *New Jersey*, 351 F. 2d 429 (C. A. 3d Cir.); *Wright* v. *Dickson*, 336 F. 2d 878 (C. A. 9th Cir.); *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *State* v. *Dufour*, 206 A. 2d 82 (R. I.); *State* v. *Neely*, 229 Ore. 487, 395 P. 2d 557, modified, 398 P. 2d 482.

The cases in both categories are those readily available; there are certainly many others.

[18] For instance, compare the requirements of the catalytic case of *People* v. *Dorado*, 62 Cal. 2d 350, 398 P. 2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, p. 26 (1966 Cardozo Lecture, N. Y. City Bar Ass'n, multilith copy).

must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had in fact been recently fixed as Department of Justice policy. See Beany, Right to Counsel 29–30, 36–42 (1955). In *Mapp*, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U. S., at 651. In *Gideon*, which extended *Johnson* v. *Zerbst* to the States, an *amicus* brief was filed by 22 States and Commonwealths urging that course; only two States beside the respondent came forward to protest. See 372 U. S., at 345. By contrast, in this case new restrictions on police questioning have been opposed by the United States and in an *amicus* brief signed by 27 States and Commonwealths, not including the three other States who are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

The Court in closing its general discussion invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief résumé will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy,[19] but in all events the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind.

[19] The Court's *obiter dictum* notwithstanding, *ante*, p. 48, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

And the warning as to appointed counsel apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See *ante*, pp. 46–48. Apparently American military practice, briefly mentioned by the Court, has these same limits and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, *supra*, n. 2, at 1084–1089.

The law of the foreign countries described by the Court also reflects a more moderate conception of the rights of the accused as against those of society when other data is considered. Concededly, the English experience is most relevant. In that country, a caution as to silence but not counsel has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion confessions can be and apparently quite frequently are admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common-law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify.[20]

India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments,

[20] For citations and discussion covering each of these points, see Developments, *supra*, n. 2, at 1091–1097, and Enker & Elsen, *supra*, n. 12, at 80 & n. 94.

supra, n. 2, at 1106–1110; *Reg.* v. *Ramasamy* [1965] A. C. 1 (P. C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and in many other respects Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country.[21] The Court ends its survey by imputing added strength to our privilege against self-incrimination since, by contrast to other countries, it is embodied in a written Constitution. Considering the liberties the Court has today taken with constitutional history and precedent, few will find this emphasis persuasive.

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive reexamination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study group of the American Law Institute, headed by Professor Vorenberg of the Harvard Law School; and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States.[22] Studies are also being conducted by the

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[21] On comment, see Hardin, Other Answers: Search and Seizure, Coerced Confession, and Criminal Trial in Scotland, 113 U. Pa. L. Rev. 165, 181 and nn. 96–97 (1964). Other examples are less stringent search and seizure rules and no automatic exclusion for violation of them, *id.*, at 167–169; guilt based on majority jury verdicts, *id.*, at 185; and pre-trial discovery of evidence on both sides, *id.*, at 175.

[22] Of particular relevance is the ALI's drafting of a Model Code of Pre-Arraignment Procedure, now in its first tentative draft. While the ABA and National Commission studies have wider scope, the former is lending its advice to the ALI project and the executive director of the latter is one of the reporters for the Model Code.

District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research.[23] There are also signs that legislatures in some of the States may be preparing to re-examine the problem before us.[24]

It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past.[25] But the legislative reforms when they came would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV. Conclusions.

All four of the cases involved here present express claims that confessions were inadmissible, not because of coercion in the traditional due process sense, but solely

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[23] See Brief for the United States in *Westover*, p. 45. The N. Y. Times, June 3, 1966, p. 33 (city ed.) reported that the Ford Foundation has awarded $1,100,000 for a five-year study of arrests and confessions in New York.

[24] The New York Assembly recently passed a bill to require certain warnings before an admissible confession is taken, though the rules are less strict than are the Court's. N. Y. Times, May 24, 1966, p. 35 (late city ed.).

[25] The Court waited 12 years after *Wolf* v. *Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded in *Mapp* v. *Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest so the exclusionary rule was necessary.

because of lack of counsel or lack of warnings concerning counsel and silence. For the reasons stated in this opinion, I would adhere to the due process test and reject the new requirements inaugurated by the Court. On this premise my disposition of each of these cases can be stated briefly.

In two of the three cases coming from state courts, *Miranda* v. *Arizona* (No. 759) and *Vignera* v. *New York* (No. 760), the confessions were held admissible and no other errors worth comment are alleged by petitioners. I would affirm in these two cases. The other state case is *California* v. *Stewart* (No. 584), where the state supreme court held the confession inadmissible and reversed the conviction. In that case I would dismiss the writ of certiorari on the ground that no final judgment is before us, 28 U. S. C. § 1257 (1964 ed.); putting aside the new trial open to the State in any event, the confession itself has not even been finally excluded since the California Supreme Court left the State free to show proof of a waiver. If the merits of the decision in *Stewart* be reached, then I believe it should be reversed and the case remanded so the state supreme court may pass on the other claims available to respondent.

In the federal case, *Westover* v. *United States* (No. 761), a number of issues are raised by petitioner apart from the one already dealt with in this dissent. None of these other claims appears to me tenable, nor in this context to warrant extended discussion. It is urged that the confession was also inadmissible because not voluntary even measured by due process standards and because federal-state cooperation brought the *McNabb-Mallory* rule into play under *Anderson* v. *United States*, 318 U. S. 350. However, the facts alleged fall well short of coercion in my view, and I believe the involvement of federal agents in petitioner's arrest and detention by the State too slight to invoke *Anderson*. I agree with the

Government that the admission of the evidence now protested by petitioner was at most harmless error, and two final contentions—one involving weight of the evidence and another improper prosecutor comment—seem to me without merit. I would therefore affirm Westover's conviction.

In conclusion: Nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court takes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas* v. *Jeannette*, 319 U. S. 157, 181 (separate opinion): "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

SUPREME COURT OF THE UNITED STATES

Nos. 759, 760, 761 AND 584.—OCTOBER TERM, 1965.

Ernesto A. Miranda, Petitioner, 759 v. State of Arizona.	On Writ of Certiorari to the Supreme Court of the State of Arizona.
Michael Vignera, Petitioner, 760 v. State of New York.	On Writ of Certiorari to the Court of Appeals of the State of New York.
Carl Calvin Westover, Petitioner, 761 v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.
State of California, Petitioner, 584 v. Roy Allen Stewart.	On Writ of Certiorari to the Supreme Court of the State of California.

[June 13, 1966.]

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common-law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later, "[b]ut there is nothing in the

reports to suggest that the theory has its roots in the privilege against self-incrimination. And so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates." Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when "[c]onsidered in the light to be shed by grammar and the dictionary . . . appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant." Corwin, The Supreme Court's Construction of the Self-Incrimination Clause, 29 Mich. L. Rev. 1, 2. And there is very little in the surrounding circumstances of the adoption of the Fifth Amendment or in the provisions of the then existing state constitutions or in state practice which would give the constitutional provision any broader meaning. Mayers, The Federal Witness' Privilege Against Self Incrimination: Constitutional or Common-Law? 4 American Journal of Legal History 107 (1960). Such a construction, however, was considerably narrower than the privilege at common law, and when eventually faced with the issues, the Court extended the constitutional privilege to the compulsory production of books and papers, to the ordinary witness before the grand jury and to witnesses generally. *Boyd* v. *United States*, 116 U. S. 616, and *Counselman* v. *Hitchcock*, 142 U. S. 547. Both rules had solid support in common-law history, if not in the history of our own constitutional provision.

A few years later the Fifth Amendment privilege was similarly extended to encompass the then well-established rule against coerced confessions: "In criminal trials, in

the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram* v. *United States*, 168 U. S. 532, 542. Although this view has found approval in other cases, *Burdeau* v. *McDowell*, 256 U. S. 465, 475; *Powers* v. *United States*, 223 U. S. 303, 313; *Shotwell* v. *United States*, 371 U. S. 341, 347, it has also been questioned, see *Brown* v. *Mississippi*, 297 U. S. 278, 285; *United States* v. *Carignan*, 342 U. S. 36, 41; *Stein* v. *New York*, 346 U. S. 156, 191, n. 35, and finds scant support in either the English or American authorities, see generally *Regina* v. *Scott*, I Dears. & Bell 47; III Wigmore, Evidence § 823, at 249 ("a confession is not rejected because of any connection with the *privilege against self-crimination*"), 250, n. 5 (particularly criticizing *Bram*) (3d ed. 1940), VIII Wigmore, Evidence §2266, at 400–401 (McNaughton ed. 1961). Whatever the source of the rule excluding coerced confessions, it is clear that prior to the application of the privilege itself to state courts, *Malloy* v. *Hogan*, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. *Id.*, at 6–7, 10.

Bram, however, itself rejected the proposition which the Court now espouses. The question in *Bram* was whether a confession, obtained during custodial interrogation, had been compelled, and if such interrogation was to be deemed inherently vulnerable, the Court's inquiry could have ended there. After examining the English and American authorities, however, the Court declared that:

> "In this Court also it has been settled that the mere fact that the confession is made to a police officer,

> while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not statements of the prisoner were voluntary." 168 U. S., at 558.

In this respect the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus prior to *Bram* the Court, in *Hopt* v. *Utah*, 110 U. S. 574, 583–587, had upheld the admissibility of a confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55:

> "Counsel for the accused insist that there cannot be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offence. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary, and was not obtained by putting the prisoner in fear or by promises. Wharton's Cr. Ev. 9th ed. §§ 661, 663, and authorities cited."

Accord, *Pierce* v. *United States*, 160 U. S. 355, 357.

And in *Wilson* v. *United States*, 162 U. S. 613, 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness. "The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him, but on the contrary, if the confession was voluntary, it is sufficient though it appear that he was not so warned."

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers* v. *United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb* v. *United States*, 318 U. S. 332, 346; accord, *United States* v. *Mitchell*, 322 U. S. 65, despite its having been elicited by police examination, *Wan* v. *United States*, 266 U. S. 1, 14; *United States* v. *Carrignan*, 342 U. S. 36, 39. Likewise, in *Crooker* v. *California*, 357 U. S. 433, the Court said that "the mere fact of police detention and police examination in private of one in official state custody does not render involuntary a confession by one so detained." And finally, in

Cicenia v. *Lagay*, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally *Culombe* v. *Connecticut*, 367 U. S. 568, 587–602 (opinion of Frankfurter, J.); III Wigmore, Evidence § 851, at 313 (3d ed. 1940); see also Joy, Confessions 38, 46 (1842).

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

II

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution.[1] This is what the Court historically has done. Indeed, it is what it must do and will continue

[1] Of course the Court does not deny that it is departing from prior precedent; it expressly overrules *Crooker* and *Cicenia*, *ante*, at 41, n. 47, and it acknowledges that "[i]n these cases . . . we might not find the statements to have been involuntary in traditional terms," *ante*, at 19.

to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

But if the Court is here and now to announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision in this Court and to inquire into the advisability of its end product in terms of the long-range interest of the country. At the very least the Court's text and reasoning should withstand analysis and be a fair exposition of the constitutional provision which its opinion interprets. Decisions like these cannot rest alone on syllogism, metaphysics or some ill-defined notions of natural justice, although each will perhaps play its part. In proceeding to such constructions as it now announces, the Court should also duly consider all the factors and interests bearing upon the cases, at least insofar as the relevant materials are available; and if the necessary considerations are not treated in the record or obtainable from some other reliable source, the Court should not proceed to formulate fundamental policies based on speculation alone.

III.

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if *compelled*. Hence the core of the Court's opinion is that because of the "compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice," *ante*, at 20, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years experience. Nor does it assert that its novel

conclusion reflects a changing consensus among state courts, see *Mapp* v. *Ohio*, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, see *Gideon* v. *Wainwright*, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence.[2] Insofar as it appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.

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[2] In fact, the type of sustained interrogation described by the Court appears to be the exception rather than the rule. A survey of 399 cases in one city found that in almost half of the cases the interrogation lasted less than 30 minutes. Barrett, Police Practices and the Law—From Arrest to Release or Charge, 50 Calif. L. Rev. 11, 41–45 (1962). Questioning tends to be confused and sporadic and is usually concentrated on confrontations with witnesses or new items of evidence, as these are obtained by officers conducting the investigation. See generally LaFave, Arrest: The Decision to Take a Suspect into Custody 386 (1965); ALI, Model Pre-Arraignment Procedure Code, Commentary § 5.01, at 170, n. 4 (Tent. Draft No. 1, 1966).

Although in the Court's view in-custody interrogation is inherently coercive, it says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his admission. Yet, under the Court's rule, if the police ask him a single question such as "Do you have anything to say?" or "Did you kill your wife?" his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

Today's result would not follow even if it were agreed that to some extent custodial interrogation is inherently coercive. See *Ashcraft* v. *Tennessee*, 322 U. S. 143, 161 (Jackson, J., dissenting). The test has been whether the totality of circumstances deprived the defendant of a "free choice to admit, to deny, or to refuse to answer," *Lisenba* v. *California*, 314 U. S. 219, 241, and whether physical or psychological coercion was of such a degree that "the defendant's will was overborne at the time he confessed," *Haynes* v. *Washington*, 373 U. S. 503, 513; *Lynumn* v. *Illinois*, 372 U. S. 528, 534. The duration and nature of incommunicado custody, the presence or absence of advice concerning the defendant's constitutional rights, and the granting or refusal of requests to communicate with lawyers, relatives or friends have all been rightly regarded as important data bearing on the basic inquiry. See, *e. g.*, *Ashcraft* v. *Tennessee*,

322 U. S. 143; *Haynes* v. *Washington*, 373 U. S. 503.[3] But it has never been suggested, until today, that such questioning was so coercive and accused persons so lacking in hardihood that the very first response to the very first question following the commencement of custody must be conclusively presumed to be the product of an overborne will.

If the rule announced today were truly based on a conclusion that all confessions resulting from custodial interrogation are coerced, then it would simply have no rational foundation. Compare *Tot* v. *United States*, 319 U. S. 463, 466; *United States* v. *Romano*, 382 U. S. 136. *A fortiori* that would be true of the extension of the rule to exculpatory statements, which the Court effects after a brief discussion of why, in the Court's view, they must be deemed incriminatory but without any discussion of why they must be deemed coerced. See *Wilson* v. *United States*, 162 U. S. 613, 624. Even if one were to postulate that the Court's concern is not that all confessions induced by police interrogation are coerced but rather that some such confessions are coerced and present judicial procedures are believed to be inadequate to identify the

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[3] By contrast, the Court indicates that in applying this new rule it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." *Ante*, at 31. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See *United States* v. *Bolden*, 355 F. 2d 453 (C. A. 7th Cir. 1965), petition for cert. pending No. 1143 O. T. 1965 (secret service agent); *People* v. *DuBond*, 235 Cal. App. 2d 844, 45 Cal. Rptr. 717, pet. for cert. pending No. 1053 Misc. O. T. 1965 (former police officer).

confessions that are coerced and those that are not, it would still not be essential to impose the rule that the Court has now fashioned. Transcripts or observers could be required, specific time limits, tailored to fit the cause, could be imposed, or other devices could be utilized to reduce the chances that otherwise indiscernible coercion will produce an inadmissible confession.

On the other hand, even if one assumed that there was an adequate factual basis for the conclusion that all confessions obtained during in-custody interrogation are the product of compulsion, the rule propounded by the Court would still be irrational, for, apparently, it is only if the accused is also warned of his right to counsel and waives both that right and the right against self-incrimination that the inherent compulsiveness of interrogation disappears. But if the defendant may not answer without a warning a question such as "Where were you last night?" without having his answer be a compelled one, how can the court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint? And why if counsel is present and the accused nevertheless confesses, or counsel tells the accused to tell the truth, and that is what the accused does, is the situation any less coercive insofar as the accused is concerned? The court apparently realizes its dilemma of foreclosing questioning without the necessary warnings but at the same time permitting the accused, sitting in the same chair in front of the same policemen, to waive his right to consult an attorney. It expects, however, that not too many will waive the right; and if it is claimed that he has, the State faces a severe, if not impossible burden of proof.

All of this makes very little sense in terms of the compulsion which the Fifth Amendment proscribes. That amendment deals with compelling the accused himself.

It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a "right to counsel to protect the Fifth Amendment privilege . . . ." *Ante*, at 32. The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

In sum, for all the Court's expounding on the menacing atmosphere of police interrogation procedures it has failed to supply any foundation for the conclusions it draws or the measures it adopts.

IV.

Criticism of the Court's opinion, however, cannot stop at a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by

its own independent labors. *Ante,* at 22. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, with the police asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or with confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo* v. *Illinois,* 378 U. S. 478, 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown* v. *Walker,* 161 U. S. 591, 596; see also *Hopt* v. *Utah,* 110 U. S. 574, 584–585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious

to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutory rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the task of sorting out inadmissible evidence and must be replaced by the *per se* rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

The most basic function of any government is to provide for the security of the individual and of his property. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.

The modes by which the criminal laws serve the interest in general security are many. First the murderer who has taken the life of another is removed from the streets, deprived of his liberty and thereby prevented from repeating his offense. In view of the statistics on recidivism in this county [4] and of the number of instances

[4] Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Re-

in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

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ports. Of 192,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years the group had accumulated 434,000 charges. FBI, Uniform Crime Reports—1964, 27–28. In 1963 and 1964 between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25–27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia between 28% and 35% of those sentenced had prior prison records and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J. of Crim. L., C. & P. S. 59 (1965) (within five years of release 62.33% of sample had committed offenses placing them in recidivist category).

Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted. That the criminal law is wholly or partly ineffective with a segment of the population or with many of those who have been apprehended and convicted is a very faulty basis for concluding that it is not effective with respect to the great bulk of our citizens or for thinking that without the criminal laws, or in the absence of their enforcement, there would be no increase in crime. Arguments of this nature are not borne out by any kind of reliable evidence that I have seen to this date.

Thirdly, the law concerns itself with those whom it has confined. The hope and aim of modern penalogy, fortunately, is as soon as possible to return the convict to society a better and more law-abiding man than when he entered. Sometimes there is success, sometimes failure. But at least the effort is made, and it should be made to the very maximum extent of our present and future capabilities.

The rule announced today will measurably weaken the ability of the criminal law to perform in these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials.[5] Criminal trials, no

[5] Eighty-eight federal district courts (excluding the District Court for the District of Columbia) disposed of the cases of 33,381 criminal defendants in 1964. Only 12.5% of those cases were actually tried. Of the remaining cases, 89.9% were terminated by convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, *supra*, note 4, 3–6. In the District Court for the District of Columbia a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. *Id.*, at 58–59. No reliable statistics are available concerning the percentage of cases in which

matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, *supra*, note 4, at 6 (Table 4), 59 (Table 1); Federal Offenders: 1963, *supra*, note 4, at 5 (Table 3); District of Columbia Offenders: 1963, *supra*, note 4, at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants, who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence, will now, under this new version of the Fifth Amendment, either not be tried at all or acquitted if the State's evidence, minus the confession, is put to the test of litigation.

I have no desire whatsoever to share the responsibility for any such impact on the present criminal process.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to

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guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

Perhaps of equal significance is the number of instances of known crimes which are not solved. In 1964, only 388,946, or 23.9% of 1,626,574 serious known offenses were cleared. The clearance rate ranged from 89.8% for homicides to 18.7% for larceny. FBI, Uniform Crime Reports—1964, 20–22, 101. Those who would replace interrogation as an investigatorial tool by modern scientific investigation techniques significantly overestimate the effectiveness of present procedures, even when interrogation is included.

repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Nor can this decision do other than have a corrosive effect on the criminal law as an effective device to prevent crime. A major component in its effectiveness in this regard is its swift and sure enforcement. The easier it is to get away with rape and murder, the less the deterrent effect on those who are inclined to attempt it. This is still good common sense. If it were not, we should posthaste liquidate the whole law enforcement establishment as a useless, misguided effort to control human conduct.

And what about the accused who has confessed or would confess in response to simple, noncoercive questioning and whose guilt could not otherwise be proved? Is it so clear that release is the best thing for him in every case? Has it so unquestionably been resolved that in each and every case it would be better for him not to confess and to return to his environment with no attempt whatsoever to help him? I think not. It may well be that in many cases it will be no less than a callous disregard for his own welfare as well as for the interests of his next victim.

There is another aspect to the effect of the Court's rule on the person whom the police have arrested on probable cause. The fact is that he may not be guilty at all and may be able to extricate himself quickly and

simply if he were told the circumstances of his arrest and were asked to explain. This effort, and his release, must now await the hiring of a lawyer or his appointment by the court, consultation with counsel and then a session with the police or the prosecutor. Similarly, where probable cause exists to arrest several suspects, as where the body of the victim is discovered in a house having several residents, see *Johnson* v. *State*, 238 Md. 140, 207 A. 2d 643 (1965), pet. for cert. pending No. 274 Misc. O. T. 1965, it will often be true that a suspect may be cleared only through the results of interrogation of other suspects. Here too the release of the innocent may be delayed by the Court's rule.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnaping, see *Brinegar* v. *United States*, 338 U. S. 160, 183 (Jackson, J., dissenting); *People* v. *Modesto*, 398 P. 2d 753, 759, 42 Cal. Rptr. 417, 423 (1965), those involving the national security, see *Drummond* v. *United States*, 354 F. 2d 132, 147 (C. A. 2d Cir. 1965)) (*en banc*) (espionage case), pet. for cert. pending No. 1203 Misc. O. T. 1965; cf. *Gessner* v. *United States*, 354 F. 2d 726, 730, n. 10 (C. A. 10th Cir. 1965) (upholding, in espionage case, trial ruling that Government need not submit classified portions of interrogation transcript), and some organized crime situations. In the latter context the lawyer who arrives may also be the lawyer for the defendants' colleagues and can be relied upon to insure that no breach of the organization's security takes place even though

the accused may feel that the best thing he can do is to cooperate.

At the same time, the Court's *per se* approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration, will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Applying the traditional standards to the cases before the Court, I would hold these confessions voluntary. I would therefore affirm in Nos. 759, 760, and 761 and reverse in No. 584.

END OF CASE